# DOCKET

No. 08-911
Title: Agron Kucana, Petitioner
v.
Eric H. Holder, Jr., Attorney General
Docketed: January 22, 2009
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (07-1002)
Decision Date: July 7, 2008
Questions Presented

| Date | Proceedings and Orders |
|---|---|
| Oct 3 2008 | Petition for a writ of certiorari filed. (Response due February 23, 2009) |
| Feb 19 2009 | Order extending time to file response to petition to and including March 25, 2009. |
| Mar 25 2009 | Brief of respondent Eric H. Holder, Jr., Attorney General in opposition filed. |
| Apr 8 2009 | DISTRIBUTED for Conference of April 24, 2009. |
| Apr 8 2009 | Reply of petitioner Agron Kucana filed. (Distributed) |
| Apr 27 2009 | Petition GRANTED. |
| May 27 2009 | The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 13, 2009. |
| May 27 2009 | The time within which to file respondent's brief on the merits is extended to and including September 11, 2009. |
| Jul 13 2009 | Brief of respondent Eric H. Holder, Jr., Attorney General in support of petitioner filed. |
| Jul 13 2009 | Joint appendix filed. (Statement of costs received). |
| Jul 13 2009 | Brief of petitioner Agron Kucana filed. |
| Jul 20 2009 | Brief amici curiae of Law Professors filed. |
| Jul 20 2009 | Brief amicus curiae of American Civil Liberties Union filed. |
| Jul 20 2009 | Brief amici curiae of National Immigrant Justice Center, et al. filed. |
| Jul 30 2009 | Amanda C. Leiter, Esq., of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below. |
| Jul 30 2009 | The time within which to file the brief of amicus curiae in support of the judgment below is extended to and including October 5, 2009. |
| Aug 17 2009 | SET FOR ARGUMENT Tuesday, November 10, 2009 |
| Aug 17 2009 | Motion for divided argument filed by respondent Eric H. Holder, Jr., Attorney General in support of petitioner. |
| Aug 17 2009 | CIRCULATED. |
| Aug 18 2009 | Record for the U.S.C.A. for the 7th Circuit is electronic. |
| Oct 5 2009 | Motion for divided argument filed by respondent Eric H. Holder, Jr., Attorney General in support of petitioner GRANTED |
| Oct 5 2009 | Brief amici curiae of Washington Legal Foundation, et al. filed. (Distributed). |
| Oct 5 2009 | Brief of Court-Appointed Amicus Curiae in support of the judgment below filed. (Distributed) |
| Nov 3 2009 | Reply of respondent Eric H. Holder, Jr., Attorney General, supporting petitioner filed. (Distributed) |
| Nov 3 2009 | Reply of petitioner Agron Kucana filed. (Distributed) |

Nov 10 2009 Argued. For petitioner: Rick M. Schoenfield, Chicago, Ill. For respondent in support of petitioner: Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For amicus curiae in support of the judgment below: Amanda C. Leiter, Washington, D.C. (Appointed by this Court.)

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# PETITION FOR WRIT OF CERTIORARI

No. 08-

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

AGRON KUCANA,
*Petitioner,*
*v.*

MICHAEL B. MUKASEY, Attorney General
of the United States,
*Respondent.*

**PETITION FOR A WRIT OF CERTORARI**
**TO THE UNITED STATES**
**COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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## QUESTIONS PRESENTED

1. What is the scope of the jurisdictional stripping provision of 8 U.S.C. Section 1252(a)(2)(B)(ii) and whether the statute removes jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals?

## LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner is Agron Kucana. The respondent is Michael B. Mukasey, the Attorney General of the United States. There are no corporate parties.

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Decision of the Board of Immigration Appeals, dated December 8, 2006 (unpublished)

## STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Seventh Circuit on July 7, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

8 U.S.C. Section 1252(a)(2)(B)(ii) states:

(a)

* * *

(2) Matters not subject to judicial review

* * *

(B) Denials of discretionary relief Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

* * *

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of

**the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.**

## STATEMENT OF THE CASE

The Board of Immigration Appeals [hereinafter "the Board"] had proper jurisdiction over petitioner's motion to reopen pursuant to 8 C.F.R. § 1003.2(a) because it had previously rendered a decision in the case and because the motion was based upon changed country conditions and material information that was not and cannot have been available in the course of the previous removal proceeding pursuant to 8 U.S.C. Section 1229a(c)(7)(C)(ii) and 8 C.F.R. 1003.2(c)(3)(ii).

Petitioner submits that the Court of Appeals had jurisdiction to hear his appeal pursuant to 8 U.S.C.§ 1252(a)(2)(B)(ii), but the Court of Appeals held to the contrary and that is the subject of this petition for certiorari.

Agron Kucana is a native and citizen of Albania. (JA 543). Petitioner entered the United States on July 12, 1995 on a B1/B2 visa. (JA 543). Petitioner applied for political asylum because of his political involvement in his native country. (JA 550). In 1990 and in the time leading up to the election of March 1992, Kucana was politically active, spoke out for democratic changes and political pluralism,

campaigned for the Albanian Democratic Party, and demonstrated against the government. (JA 270-73, 550-55) As a result, a number of times, Kucana was threatened, arrested and beaten. (JA 272, 274-76, 552, 556) On another occasion, petitioner's vehicle was forced off the road and down a mountain side. (JA 275, 556).

After the Democratic Party won the election of March 1992, Kucana continued to work for the party and continued to be politically active. (JA 278, 557). However, the party splintered into factions and Kucana realized that members of the former Communist secret police had influence within the newly empowered party. (JA 276, 279, 558).

In 1993, petitioner was riding a bicycle home from a party meeting when he was hit by a car which did not stop. (JA 279). Kucana believes that the act was politically motivated because the car had no license plate or identification marks. (JA 279).

In 1994, Kucana was held by the police for 20 hours and was beaten. (JA 280, 558). Later that year, petitioner was fired from his

job and removed from his post in the Democratic Party. (JA 280, 559).

In March 1995, petitioner was attacked at his home by 4 men dressed in black. (JA 559). When Kucana reported the incident, he was told that the police were unable to protect him because he had very influential enemies. (JA 559).

Two months later, Kucana received news that the Democratic Party was filing charges against him alleging that he was "agitating the party." (JA 281). He fled to Turkey after receiving a warrant for his arrest, but returned to Albania for his interview with the U.S. Embassy. (JA 282).

Petitioner entered the United States in July 1995 on a visitor visa. (JA 282, 543). The Department of Justice issued an order to show cause and served it on the petitioner in June 1996. (JA 609). Petitioner subsequently applied for political asylum and withholding of removal with the Executive Office for Immigration Review. (JA 282, 543-560).

Kucana's asylum application was proceeding when he failed to appear for a hearing and was ordered deported in absentia

by the Immigration Judge on October 9, 1997. (JA 268). Kucana's attorney submitted a timely motion, with supporting affidavits, to reopen explaining that Kucana had missed his hearing because he slept through his alarm and arrived shortly after the Immigration Judge ordered him deported in absentia. (JA 242, 244, 245). That motion to reopen was denied and he appealed to the Board. (JA 135, 139-147, 253). On May 7, 2002, the Board affirmed and dismissed petitioner's appeal. (JA 134-135).

On June 22, 2006, petitioner filed a second motion to reopen with the Immigration Judge based on new evidence of a change in country conditions and the fact that he was now the beneficiary of an approved I-130 immediate relative petition filed by his mother. (JA 48-51; 105). Petitioner contended that as a supporter of democracy and of free markets, he would be in danger of being beaten or murdered, as a result of how conditions in Albania have deteriorated. *Kucana v. Mukasey*, 533 F.3d 534, 535-36 (7th Cir. 2008). Included with the motion to reopen was an affidavit and report from Professor Bernd Fischer, a professor of Balkan history

and chair of the department of history at Indiana University Purdue University Fort Wayne and a scholar on modern Albanian society and politics. (JA 108-109).

In summary, Fischer explained that while the 2005 elections brought the Democratic Party back into power, the elections were marred by violence against political activists of most major parties, and the Socialist Party still controls the presidency, most of the municipalities, and has significant influence on the police and the court system. (JA 113). Fisher concluded that Kucana's fears of returning to Albania are well-founded, as political henchmen and groups associated with organized crime and the old regime continue to flourish, often protected by high-ranking officials, while the police are poorly trained, underpaid, extremely brutal, and have been known to carry out violence against political enemies. (JA 114-15). Although a 2005 State Department report indicates that Albania is safe, Fischer cited numerous international reports to the contrary. (JA 120-21).

This motion to reopen was denied on August 22, 2006, and petitioner appealed to

the Board. (JA 2-12, 40-41). On December 8, 2006, the Board denied petitioner's appeal on the basis that Kucana failed to demonstrate changed country circumstances in Albania. (JA 1-2). The Board held that the Immigration Judge did not have jurisdiction over the second motion to reopen. (JA 2). Successive motions to reopen can be filed directly with the Board and, the Board treated Kucana's filing as such a motion. *Kucana v. Mukasey*, 533 F.3d 534, 536 (7th Cir. 2008). However, with a dissent and a concurrence, dubitante, the Seventh Circuit held that it lacked jurisdiction to hear the appeal under 8 U.S.C. Section 1252(a)(2)(B)(ii). *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008). Four members of the court dissented from the denial of a rehearing en banc. *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008).

## REASONS FOR ALLOWING THE WRIT

1. Certiorari Should Be Granted Because The Seventh Circuit's Expansive Interpretation Of The Jurisdictional Stripping Provision Of 8 U.S.C. Section 1252(a)(2)(B)(ii) Conflicts With Supreme Court Precedent, Conflicts With Every Other Circuit Which Has Considered The Issue, And Conflicts With The Position Of The Department Of Justice.

In this case, the Seventh Circuit held that Section 242(a)(2)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. Section 1252(a)(2)(B)(ii), strips federal courts of jurisdiction to review the Board of Immigration Appeals' [hereinafter "the Board"] denial of an alien's motion to reopen, where the Board's discretion is specified by regulation, rather than by statute. *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008).

It did so despite the language of Section 1252(a)(2)(B)(ii) which strips jurisdiction only where the administrative decision "is specified under this subchapter to be in the discretion of

the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title." The subchapter itself does not specify that an alien's motion to reopen is in the discretion of the Attorney General or the Security of Homeland Security. Thus, the Seventh Circuit's holding is contrary to the "long standing principle of construing any ambiguities in deportation statutes in favor of the alien." *Dada v. Mukasey*, 128 S.Ct. 2307, 2318 (U.S.,2008), quoting *Ins v. St. Cyr*, 533 U.S. 289, 320, 121 S.Ct. 2271, 150 L.Ed2d 347 (2001), quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed2d 4334 (1987).

Additionally, the Seventh Circuit's decision must be considered in the context of the "strong presumption in favor of judicial review of administrative action." *Ins v. St. Cyr*, 533 U.S. 289, 298, 121 S.Ct. 2271, 150 L.Ed2d 347 (2001).

*Kucana* overruled the Seventh Circuit's prior decision in *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005) and led four members of the Seventh Circuit to conclude:

> This new holding of the Supreme Court [*Dada v. Mukasey*] should make us pause, take a deep breath and consider anew whether we really want to take the Circuit down a path so contrary to the manifest intent of Congress and to the Supreme Court's understanding of that intent. If we take such a course, our decision will no doubt warrant close scrutiny by the Supreme Court. *See* Sup. Ct. R. 10. *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc.

"The Supreme Court has analogized motions to reopen to motions under the Federal Rule of Civil Procedure 60(b), *see Stone v. INS*, 514 U.S. 386, 405 (1995)." *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc. A motion to reopen "is a judicial creation later codified by federal statute." *Dada v. Mukasey*, 128 S.Ct. 2307, 2315 (U.S.,2008). The Illegal Immigration

Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (IIRIRA or the Act) "transforms the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien." *Dada v. Mukasey*, 128 S.Ct.2307, 2316 (2008).

"[T]he Supreme Court has characterized motions to reopen as an 'important safeguard' designed to 'ensure a proper and lawful disposition.'" *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2318 (2008).

Thus, at issue are both an important procedural safeguard, as well as the broader question of whether the jurisdiction stripping provision should be limited to its express terms or whether regulations should be read into the statute, as the Seventh Circuit has done.

The Seventh Circuit's holding places it in "a minority with the minority, giving the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that

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Congress intended to strip [courts] of [their] jurisdiction." *Kucana v. Mukasey*, 533 F.3d 534, 540 (7th Cir. 2008), Cudahy, J. dissenting.

Most courts of appeal hold that there is jurisdiction to review the denial of motions to reopen because the jurisdiction stripping provision of the statute only applies where there the basis of a discretionary decision is an express statutory provision, not merely a regulation. *Singh v. Mukasey*, 536 F.3d 149, 153-54 (2d Cir. 2008); *Miah v. Mukasey*, 519 F.3d 784, 789, n.1 (8th Cir. 2008); *Jahjaga v. Attorney General of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zafar v. U.S. Attorney General*, 461 F.3d 1357, 1361 (11th Cir. 2006); *Manzano-Garcia v. Gonzales*, 413 F.3d 462, 466 (5th Cir. 2005); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004). The Tenth Circuit also takes the position that jurisdiction exists to review the Board's denial of an alien's motion to reopen. *Thongphilack v. Gonzales*, 506 F.3d 1207, 1209-10 (10th Cir. 2007).

The majority in *Kucana* acknowledged that its decision was contrary to the Department of Justice's position that Section

1252(a)(2)(B)(ii) "does not cover decisions not to reopen." *Id.*, 533 F.3d at 537. Thus, both the petitioning alien and the government agreed that the court had jurisdiction to decide the merits of the appeal.

Given the importance of the procedural safeguard involved, the significance of the proper approach to interpreting the jurisdiction stripping statute, and the Seventh Circuit's conflict with at least seven other circuits and the government, and opinions of the Supreme Court, this case merits being heard by this Court.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted.

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# APPENDIX A– ORDER OF THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT, DECIDED JULY 7,2008

No. 07-1002.
United States Court of Appeals,
Seventh Circuit.

Agron KUCANA, Petitioner.
v.
Michael B. MUKASEY, Attorney General of the United States, Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

Argued Dec. 6, 2007.
Decided July 7, 2008.

Before EASTERBROOK, Chief Judge, and CUDAHY and RIPPLE, Circuit Judges.

EASTERBROOK, *Chief Judge*. Agron Kucana, a citizen of Albania, entered the United States as a business visitor in 1995 and did not leave when his visa expired. He applied for asylum but, when he did not appear at the hearing in the fall of 1997, he was ordered removed *in absentia*. He soon filed a motion to reopen, contending that he

had overslept. An immigration judge denied that motion, and in 2002 the Board of Immigration Appeals affirmed. Kucana did not seek judicial review-nor did he comply with the order to quit the United States. In 2006 Kucana filed another motion to reopen, this time contending that country conditions in Albania had deteriorated and that he would be a victim of persecution should he return there. Kucana, who describes himself as a supporter of democracy and free markets, contends that holders of these views are at risk of beatings and murder in Albania. The immigration judge denied this motion, and on appeal the Board held that the IJ lacked jurisdiction, because successive motions to reopen must be filed directly with the Board itself.

Treating Kucana's papers as a (second) motion to reopen, the Board denied that relief because conditions in Albania have improved since 1997. In 2006 a "Stabilization and Association Agreement" between Albania and the European Union was ratified. In 2007 a visa agreement was reached, so Albanians can travel throughout the EU. Albania is today a democratic nation with international guarantees of human rights; there have been

no reported political killings or detentions for years.

Kucana argues in this court that the Board abused its discretion because it did not mention Professor Bernd Fischer's affidavit discussing conditions in Albania. Abuse of discretion is the right standard. No statute requires the Board to reopen under *any* circumstances, and a regulation confirms that the Board has discretion to deny relief even to an alien who would have received a favorable decision, had the argument been presented earlier. 8 C.F.R. § 1003.2(a). It is difficult to perceive an abuse of discretion, for Prof. Fischer's affidavit does not document a change in Albanian conditions since 1997; it is instead a historical narrative reaching back to the time when Albania was a totalitarian dictatorship. But the parties' agreement that "abuse of discretion" is the standard of review led us to wonder whether we should be considering Kucana's argument at all.

As amended by the Real ID Act of 2005, the Immigration and Nationality Act limits federal courts' jurisdiction to review discretionary decisions of immigration officials. Section 242(a)(2)(B)(ii) of the Act, 8 U.S.C. § 1252(a)(2)(B)(ii), provides that no

court has jurisdiction to review "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title." Section 1158(a) deals with applications for asylum, but the decision that Kucana wants us to review is not one "under § 1158(a)"; it is a decision not to reopen, and thus not to revive a request for asylum that had been abandoned in 1997 when Kucana failed to attend the hearing scheduled to address that subject.

Recently this circuit addressed the question-on which other courts of appeals are divided-whether § 1252(a)(2)(B)(ii) applies when the agency's discretion is specified by a regulation rather than a statute. After the parties filed their briefs in this case, we held in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir.2007), that § 1252(a)(2)(B)(ii) applies to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act. The discretionary decision in *Ali* was whether to grant an alien's request for a continuance of a hearing; here the

discretionary decision is whether to reopen the proceeding and hold a new hearing. Regulations specify that both decisions are discretionary; both regulations draw their force from provisions in the Act allowing immigration officials to govern their own proceedings. See 8 U.S.C. § 1229a(c)(7) (authority for reopening by Board). It follows that they are equally subject to § 1252(a)(2)(B)(ii).

We asked the parties for post-argument memoranda on the effect of *Ali* and § 1252(a)(2)(B)(ii). Surprisingly, the Department of Justice argued that § 1252(a)(2)(B)(ii) does not cover decisions not to reopen. The principal reason for this conclusion (at least the one to which the memorandum devotes the most space) is that in cases such as Kucana's the Board is making a factual decision (whether country conditions have worsened) rather than a discretionary one. This does not begin to distinguish *Ali*. Before deciding whether to grant a continuance (the discretionary decision), an immigration judge must decide whether there is a good reason for more time, which depends in turn on whether the statements of fact said to constitute the good cause are true. Surely the evaluation of

the alien's circumstances cannot be reviewed notwithstanding § 1252(a)(2)(B)(ii) and *Ali*.

*Every* discretionary decision, unless made by the flip of a coin, rests on the tribunal's appreciation of the state of the litigation and the state of the world. Section 1252(a)(2)(B)(ii) could not mean that a decision is unreviewable when made randomly or unthinkingly, but that if the agency pays attention to an application and has *reasons* for acting as it does, then those reasons can be reviewed (because in principle the reasons precede, and do not equal, the discretion). This is a stripe of argument that we have considered in other contexts and found wanting. See, e.g., *Daniels v. Liberty Mutual Insurance Co.*, 484 F.3d 884 (7th Cir.2007) (prohibition on appellate review of remand orders does not leave the court of appeals free to review, as an independent matter, the reasons behind the order); *Rubel v. Pfizer Inc.*, 361 F.3d 1016 (7th Cir.2004) (same). And we have applied that understanding to immigration law. See, e.g., *Jiménez Viracacha v. Mukasey*, 518 F.3d 511 (7th Cir.2008); *Leguizamo-Medina v. Gonzales*, 493 F.3d 772 (7th Cir.2007). One cannot review the subsidiary findings that motivate an order, when the order itself is

unreviewable; that would be an advisory opinion. See *Powerex Corp. v. Reliant Energy Services, Inc.*, --- U.S. ----, 127 S.Ct. 2411, 2419, 168 L.Ed.2d 112 (2007).

A second contention in the Department's post-argument memorandum is that this court has already held § 1252(a)(2)(B)(ii) inapplicable to reopening decisions. The panel in *Singh v. Gonzales*, 404 F.3d 1024, 1026-27 (7th Cir.2005), said this:

> Before 1996, the authority for motions to reopen derived solely from the regulations. Congress codified the motion to reopen process in 1996 in 8 U.S.C. § 1229a(c)(6), a provision within the subchapter referred to in [§ 1252(a)(2)(B)(ii)]. However, the statutory language only describes the contents of motions to reopen and the filing deadlines. Conspicuously absent is any specific language entrusting the decision on a motion to reopen to "the discretion of the Attorney General." Moreover, a subsection of § 1252, the section that also contains the jurisdiction-stripping provision, provides that when a petitioner appeals a motion to reopen or reconsider an

> order, that appeal should be consolidated with the appeal of the underlying order. 8 U.S.C. § 1252(b)(6). That provision would be unnecessary if § 1252(a)(2)(B)(ii) deprived us of jurisdiction in the first place. See *Stone v. INS*, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (noting that courts must construe statutes to give effect, if possible, to every provision).

This passage gives two reasons: first, that the extent of the Board's discretion has been set by regulation rather than statute; second, that the clause allowing consolidation of challenges to original and reopening decisions would be unnecessary if § 1252(a)(2)(B)(ii) prevents review of decisions not to reopen. The first of these reasons is not tenable in this circuit after *Ali*. The second needs a fresh look.

The panel's view in *Singh* was that consolidation of proceedings concerning direct and reopening decisions would be pointless, if orders denying reopening never were subject to judicial review. That was true when the panel issued its opinion (April 15, 2005) but is true no longer. On May 11, 2005, the Real ID Act, Pub.L. 109-13 Div. B Tit. I, took effect.

Today decisions denying reopening are within our jurisdiction to the extent provided by § 1252(a)(2)(D):

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Because discretionary decisions now may be reviewed when they entail "constitutional claims or questions of law", there's nothing incongruous about the consolidation rule in § 1252(b)(6). Applying § 1252(a)(2)(B)(ii) to orders denying motions to reopen will not make any part of the statute unnecessary.

The Real ID Act not only changed the relation among statutory subsections but also alleviated the principal consideration that had led the judiciary to confine clauses such as § 1252(a)(2)(B)(ii) to the least scope they had to have. Judges were concerned that an elimination of all review would permit the agency to violate statutes and the Constitution at will. The enactment of § 1252(a)(2)(D)

eliminates that reason for giving § 1252(a)(2)(B) a narrow reading-and, as the other arguments advanced in *Singh* also have been overtaken by events, we conclude that *Singh* must be overruled to the extent it holds § 1252(a)(2)(B)(ii) inapplicable to discretionary reopening decisions. This opinion has been circulated under Circuit Rule 40(e) to all active judges. A majority did not favor a hearing en banc. (Judges Flaum, Ripple, Rovner, Wood, and Williams voted in favor of a hearing en banc.)

What remains is the question whether Kucana has advanced any "constitutional claims or questions of law". His brief does not phrase his contentions in those terms; the entire argument is that the Board abused its discretion. And although the ninth circuit might deem such an argument a proposition "of law" (because the law requires the Board *not* to abuse its discretion), see *Ramadan v. Gonzales*, 479 F.3d 646 (9th Cir.2007), rehearing en banc denied, 504 F.3d 973 (9th Cir.2007) (O'Scannlain, J., and eight other judges dissenting), we explained in *Jiménez Viracacha* why *Ramadan* misreads § 1252(a)(2)(D).

Kucana offers a second argument in support of reopening: After 2002 his mother (who has become a citizen of the United States) filed on his behalf an application for a visa as an immediate relative. The Board did not mention this when declining to reopen his case. Although the Board does not have any obligation to write an opinion explaining each decision not to reopen, it does have an obligation to consider every argument made to it. Sometimes an opinion addressing one subject (such as asylum) while not mentioning another (such as an immediate-relative visa) may imply that the latter has been overlooked rather than decided. And we may assume for the sake of argument that ignoring a potentially dispositive issue is an error of law that would allow review under § 1252(a)(2)(D). The Board must exercise discretion; only when it has done so is its decision sheltered by § 1252(a)(2)(B)(ii).

This does not help Kucana, however, because he did not present to the Board any argument that his mother's application justifies reopening to give him an opportunity to apply for adjustment of status. He attached the I-130 immediate-relative form to his motion before the immigration judge but did

not make any argument based on that visa application. Kucana's appeal to the Board did not address this subject; all of his papers dealt exclusively with his contention that conditions in Albania have changed. So it is no surprise that the Board's opinion did not address this subject; an agency need not respond to potential arguments lurking in the record but never advanced by counsel.

The petition for review is dismissed for lack of jurisdiction.

RIPPLE, Circuit Judge, concurring, dubitante.

I agree with the principal opinion that our disposition of the present case appears to be controlled by our holding in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir.2007). *Ali* held that the jurisdictional bar contained in 8 U.S.C. § 1252(a)(2)(B)(ii) "applie[d] to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act." *Kucana*, slip op. at 536. The principal opinion further explains that

[t]he discretionary decision in *Ali* was whether to grant an alien's request for a continuance of a hearing; here the discretionary decision is whether to reopen the proceeding and hold a new hearing.

Regulations specify that both decisions are discretionary; both regulations draw their force from provisions in the Act allowing immigration officials to govern their own proceedings. It follows that they are equally subject to § 1252(a)(2)(B)(ii).

Id. (internal citations omitted). *Ali*, therefore, operates as a *de facto* overruling of our decision in *Singh v. Gonzales*, 404 F.3d 1024, 1026-27 (7th Cir.2005),[FN1] which held that § 1252 was not a bar to our review of motions to reopen because the "authority for motions to reopen derived solely from the regulations." *Singh* also noted that the statute was devoid of "any specific language entrusting the decision on a motion to reopen to 'the discretion of the Attorney General.'" *Id.*

Although I believe that we are bound by the holding in *Ali* and that the principal opinion represents a logical extension of that holding, I write separately because I continue to be concerned by the breadth of *Ali*'s holding. In *Ali*, we addressed our authority to hear appeals from the denial of a motion to continue-an interim decision, discretionary in nature, which "derives from 8 U.S.C. § 1229a," which, in turn, "confers upon immigration

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judges the plenary authority to conduct removal proceedings." 502 F.3d at 660. We further observed that "[t]he regulation regarding continuances simply implements the immigration judge's statutory authority to control the course of removal proceedings." *Id.* Here, however, the rationale of *Ali* is being applied beyond the realm of procedural rulings; it is being used to deny aliens review of substantive decisions of the Board of Immigration Appeals that are based on a mistake or misunderstanding of the factual basis of the claim-decisions that the Supreme Court has analogized to motions under Federal Rule of Civil Procedure 60(b). *See Stone v. INS*, 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995). Furthermore, although the present case involves only a motion to reopen, *Ali*'s rationale would appear to apply equally to motions to reconsider-the basis for which must be a mistake or misapprehension of law. *See* 8 C.F.R. § 1003.2. In short, the rationale of *Ali*, taken to its logical conclusion, deprives this court of jurisdiction to review the BIA's mistakes of fact and law made during the course of deciding whether an alien should be removed from this Country.

Although the result today appears to be dictated by circuit precedent, I respectfully suggest that, had Congress intended to deprive this court of jurisdiction of specific substantive decisions, it would have done so explicitly, as it did in 8 U.S.C. § 1252(a)(2)(B)(i). As *Ali* spreads its dominion to substantive fields, it is turning this court into a virtual council of revision with respect to settled federal law. Before taking these steps, we should revisit the holding in *Ali* and determine whether we should chart a course that more closely adheres to the statutory language chosen and enacted by Congress.

CUDAHY, Circuit Judge, dissenting.

In *Ali v. Gonzales*, 502 F.3d 659 (7th Cir.2007), we adopted a view, which (as that opinion acknowledged) is in a minority one among the circuits, with respect to our jurisdiction over appeals from denials of continuances. Six of our sister courts had concluded that 8 U.S.C. § 1252(a)(2)(B)(ii) did not preclude federal appellate courts from reviewing orders denying such motions. Only the Eighth and Tenth Circuits had held that § 1252(a)(2)(B)(ii) precludes federal courts of appeals from reviewing an immigration

judge's denial of a continuance. *Id.* at 664 (citing *Yerkovich v. Ashcroft*, 381 F.3d 990, 993-95 (10th Cir.2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir.2004)). Yet even these courts continue to exercise jurisdiction over motions to reopen. *See Miah v. Mukasey*, 519 F.3d 784, 789 n. 1 (8th Cir.2008); *Thongphilack v. Gonzales*, 506 F.3d 1207, 1209-10 (10th Cir.2007). The principal opinion would cause us to become a minority within the minority, giving the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip us of our jurisdiction. Our isolated posture in this respect may give us pause here.

In approaching the problem presented by the present case, I believe that the first effort should be to reconcile *Ali* with *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir.2005) since the policies underlying stare decisis suggest the preferability of reconciliation of precedent to its rejection in whole or in part. *McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir.2005). And I believe that these two precedents may be comfortably reconciled.

In *Singh*, we held that the lack of "specific language entrusting the decision on a motion to reopen to 'the discretion of the Attorney General'" meant that the court had jurisdiction to review the BIA's decision on a motion to reopen. *Singh*, 404 F.3d at 1026-27 (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)). In *Ali*, the petitioner appealed an immigration judge's denial of his motion for a continuance. We found that although continuances were mentioned only in immigration regulations and not in a statute, an immigration judge's authority to grant a continuance derives from a statute. *Ali*, 502 F.3d at 663 (citing 8 U.S.C. § 1229a(a)(1) & (b)(1)). We reasoned that

> the immigration judge's *authority* to conduct and control the course of removal proceedings is "specified in" subchapter II of the INA, and this necessarily encompasses the discretion to continue the proceedings, whether on the motion of a party or sua sponte. The jurisdictional bar therefore applies to continuance decisions.

*Id.* (emphasis in original).

I do not think *Singh* and *Ali* are necessarily incompatible. 8 U.S.C. § 1229a(b) makes clear that the immigration judge has

plenary power over the conduct of removal proceedings and gives examples of the kinds of discretionary acts the judge may perform in the course of the proceedings. In contrast, § 1229a(c)(7), the section governing motions to reopen, says nothing at all about the agency's authority to decide motions to reopen. Rather, it simply lays out the requirements an alien must fulfill when filing a motion to reopen.

Ultimately, the principal opinion rests its rejection of *Singh* upon the focus of the Real ID Act upon judicial reviewability of "constitutional claims or questions of law." According to the principal opinion this eliminates the need for a narrow reading of jurisdiction-stripping provisions and meets the judiciary's principal concern in this area. I think this exercise in judicial psychoanalysis must yield to broader principles favoring judicial review of administrative decisions.

There is a "strong presumption that Congress intends judicial review of administrative action." *Traynor v. Turnage*, 485 U.S. 535, 542, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988) (citation omitted). It is only a presumption, of course, not an ironclad rule, and is overcome where it is clear that Congress intended to strip federal courts of

their power to review agency decisions. *Id.* Part of our rationale in *Ali* was based on the fact that Ali was seeking an adjustment of status under 8 U.S.C. § 1255. Section 1252(a)(2)(B)(i) expressly bars us from reviewing such decisions, providing that "no court shall have jurisdiction to review (i) any judgment regarding the granting of relief under section ... 1255 of this title." A clear Congressional command would have barred our review of the final decision, and statutory language suggested the plenary nature of the IJ's authority over the procedural steps on the way to that unreviewable final decision. Thus, Ali's continuance motion "was a procedural step along the way to an unreviewable final decision." *Ali*, 502 F.3d at 664.

In contrast, the underlying relief sought in the present case is asylum-a discretionary but reviewable decision-and there is no statutory language suggesting the level of deference to be afforded a denial of a motion to reopen. As the concurrence points out, the rationale of the principal opinion would bar our review of motions to reconsider, which are based on errors of law and fact. Absent " 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or

a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" *Traynor*, 485 U.S. at 542, 108 S.Ct. 1372, 99 L.Ed.2d 618 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 673, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986)), I am reluctant to broaden the immunity from review of an administrative process not necessarily renowned for its reliability.

RIPPLE, Circuit Judge, with whom ROVNER, WOOD and WILLIAMS, Circuit Judges, join, dissenting from the denial of a rehearing en banc.This case presents an important issue with respect to the scope of this court's holding in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir.2007). In *Ali*, we addressed our authority to hear appeals from the denial of a motion to continue-an interim decision that is discretionary in nature. 502 F.3d at 660. Here, however, the rationale of *Ali* is being applied beyond the realm of such a procedural ruling; it is being used to deny aliens review of a motion to reopen, a decision of the Board of Immigration Appeals that is based on a mistake or misunderstanding of the factual basis of the claim. This expansion into the realm of outcome determinative decisions

takes us a long way from the statutory language chosen and enacted by Congress. *See* 8 U.S.C. § 1252(a)(2)(B)(i).

Applying *Ali* to deny aliens review of the decision whether to reopen crystalizes the importance of revisiting the breadth of that holding: The Supreme Court has analogized motions to reopen to motions under the Federal Rule of Civil Procedure 60(b), *see Stone v. INS*, 514 U.S. 386, 405, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995). Indeed, since the panel's consideration of this case, the Supreme Court has characterized motions to reopen as an "important safeguard" designed to "ensure a proper and lawful disposition." *Dada v. Mukasey*, --- U.S. ----, 128 S.Ct. 2307, 2322-24, --- L.Ed.2d ---- (2008). This new holding of the Supreme Court should make us pause, take a deep breath and consider anew whether we really want to take the Circuit down a path so contrary to the manifest intent of Congress and to the Supreme Court's understanding of that intent. If we take such a course, our decision will no doubt warrant close scrutiny by the Supreme Court. *See* Sup.Ct. R. 10.

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## APPENDIX B– DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED DECEMBER 8, 2008

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia, 22041
File: A73 428 513 - Chicago
Date: December 8, 2006
In re: AGRON KUCANA
IN DEPORTATION PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: Hiwot Michael, Esquire
ON BEHALF OF DHS: Kim Kucik, Assistant Chief Counsel

ORDER:
PER CURIAM. The respondent is a citizen of Albania. The record reflects that on October 9, 1997, he was ordered deported from the United States because he failed to appear for his hearing. The respondent filed a motion to reopen with the Immigration Judge, but the Immigration Judge denied it on February 17, 1998. The Board later dismissed an appeal of that decision on May 7, 2002. On June 26,

2006, the respondent filed a motion to reopen with the Immigration Judge. The Immigration Judge denied the motion on July 11, 2006, and this appeal followed. The appeal will be dismissed.

We initially note that the Immigration Judge did not have jurisdiction to consider the respondent's motion. The Board was last to render a decision in this matter. Jurisdiction therefore remained with the Board to consider the respondent's motion. *See generally Matter of A-N- & R-M-N-*, 22 I&N Dec. 953 (BIA 1999). Assuming that the Immigration Judge had jurisdiction to consider the motion, the respondent argues on appeal that these proceedings should be reopened to allow him an opportunity to seek asylum and withholding of deportation in the United States based on material changed conditions or circumstances in Albania. *See Matter of A-N- & R-M-N-*, *supra* (holding that aliens seeking to reopen proceedings to apply for asylum and withholding of deportation or removal who have presented evidence establishing materially changed circumstances in their homeland or place of last habitual residence, such that they meet the general

requirements for motions to reopen, need not demonstrate "reasonable cause" for their failure to appear at the prior hearing).

The respondent fears returning to Albania because he was a supporter of the Democratic Party in his country. According to the United States Department of State Country Reports, Albania is a republic with a multiparty parliament (Bureau of Democracy, Human Rights and Labor, U.S. Department of State, Albania Country Reports on Human Rights Practices -- 2005 (March 8, 2006).

The Constitution provides citizens with the right to change their government peacefully, and citizens exercised this right in practice through periodic elections held on the basis of universal suffrage. We further note that the Democratic Party participates in the political system and holds seats in Parliament, and the current Prime Minister of Albania is from the Democratic Party. Also, there were no confirmed cases of people being killed or detained strictly for political reasons. *See Bejko v. Gonzales, 2006 WL 3258212* (7th Cir.

2006)[1]. *See also Cecaj v. Gonzales, 440 F.3d 897* (7th Cir. 2006) (noting that conditions in Albania have changed with the Democratic Party's involvement in the government).

Based on the evidence submitted, we are unable to find that the respondent established his prima facie eligibility for asylum or withholding of deportation in the United States based on material changes that have occurred in Albania since his failure to appear

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[1] Therein, the court noted that the United States Department of State 2003 Country Report on Human Rights Practices stated that recent elections throughout the country were generally calm, and represented an improvement over previous elections, with only a few isolated incidents of irregularities. Furthermore, the United States Department of State 2004 Profile of Asylum Claims and Country Conditions noted the consensus that in recent years Albanians had been able to freely exercise their right to change their government through democratic means including the ability to organize and campaign free from government interference. The Profile further noted that any fear of the secret police had diminished as a result of its restructuring, increased level of professionalism, and lack of involvement in political activity. Finally, the Profile recognized that serious political repression existed in the past, but noted that there had been no major outbreaks of political violence since 1998, and that the available evidence suggests that neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents.

before the immigration Judge in October 1997. See 8 C.F.R. § 1003.2(c)(3)(ii).

Accordingly, as we find that the motion to reopen was properly denied, the appeal is dismissed.

FOR THE BOARD

# OPPOSITION BRIEF

No. 08-911

# In the Supreme Court of the United States

AGRON KUCANA, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen immigration proceedings under 8 U.S.C. 1252(a)(2)(B)(ii) and (D).

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# In the Supreme Court of the United States

No. 08-911

AGRON KUCANA, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 533 F.3d 534. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 22a-26a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 7, 2008. The petition for a writ of certiorari was filed on October 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). If an alien

has been ordered removed *in absentia*, he may file a motion to reopen to rescind that order. 8 C.F.R. 1003.23(b)(4). The alien must demonstrate either that he failed to receive adequate notice of his removal hearing or that "exceptional circumstances" justify reopening. 8 C.F.R. 1003.23(b)(4)(iii)(A). If the motion alleges "exceptional circumstances," it must be filed within 180 days of the removal order. 8 C.F.R. 1003.23(B)(4)(iii)(A)(1).

An alien may also file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). As a general matter, an alien may file only one such motion to reopen, and it must be filed within 90 days of the entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2). Those limitations do not apply if the motion to reopen alleges that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or in the country to which removal has been ordered," but only "if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii).

Based on a strong interest in finality, motions to reopen are disfavored, and the movant must meet a heavy burden to satisfy those requirements. *INS* v. *Abudu*, 485 U.S. 94, 107-108, 110 (1988); *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992). That is because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). The Board has broad discretion in adjudicating a motion to reopen, and it "has discretion to deny a motion to reopen even if the party

moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *Abudu*, 485 U.S. at 110.

2. Petitioner is a native and citizen of Albania. Pet. App. 1a. He was admitted to the United States as a non-immigrant visitor in 1995 and has remained here beyond the time authorized. *Ibid.* In May 1996, he filed an application for asylum and withholding of removal with the former Immigration and Naturalization Service (INS),[1] alleging that he would be persecuted based on his political opinion if returned to Albania. Administrative Record (A.R.) 37 n.2, 543, 547, 550-560. The INS charged petitioner with being removable as an alien who overstayed his visa, A.R. 607, 609, and it referred his asylum and withholding application to an immigration judge (IJ), A.R. 37 n.2.

Petitioner appeared with counsel before the IJ. A.R. 37. He conceded that he was removable and renewed his request for asylum and withholding of removal. *Ibid.* The IJ determined that petitioner was removable as charged and scheduled a hearing to determine petitioner's asylum eligibility. A.R. 37, 253. Petitioner failed to appear for his hearing, and the IJ ordered him removed to Albania *in absentia*. Pet. App. 1a; A.R. 268.

3. Petitioner filed a motion to reopen his removal proceedings. Pet. App. 1a; A.R. 38. He alleged that he missed his hearing because he overslept. Pet. App. 1a-2a; A.R. 261.

The IJ denied petitioner's motion to reopen. A.R. 253-254; see Pet. App. 2a. The IJ determined that there was no allegation that petitioner failed to receive ade-

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

quate notice of the hearing and that petitioner's motion failed to demonstrate "exceptional circumstances" warranting reopening of his proceedings. A.R. 254.

The Board affirmed the IJ's decision without an opinion. Pet. App. 2a; A.R. 135.

4. Four years later, petitioner filed a second motion to reopen his removal proceedings with the IJ. Pet. App. 2a; A.R. 48-51. He contended that he was eligible for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, based on changed country conditions in Albania. Pet. App. 2a; A.R. 48-50. Petitioner also contended that he was eligible for adjustment of status because his mother, a naturalized United States citizen, filed a visa petition on his behalf, and that petition had been approved. Pet. App. 11a; A.R. 50.

The IJ denied petitioner's second motion to reopen. Pet. App. 2a; A.R. 37-41. The IJ determined that petitioner failed to present new evidence that warranted reopening his case: "The evidence [petitioner] has submitted is not 'new' nor so significant as to impact the basis for his asylum claim * * * first filed in May of 1996." A.R. 40. Petitioner contended that he would be persecuted in Albania because he had been a member of the Democratic Party in the early 1990s, but the IJ disagreed, explaining that the Democratic Party won Albania's most recent election and that a candidate that petitioner claimed he formerly supported became the Albanian Prime Minister. *Ibid.* The IJ observed that the affidavits petitioner presented "discuss the current government's difficulty in fighting crime and stopping political fighting but they do not reflect that this is a 'new'

event or that the government of Albania actually participates in the violence or that it is utterly unable to stop it from occurring." *Ibid.* And the IJ "question[ed] the sincerity of [petitioner's] asylum claim," because it appeared that petitioner was only raising the claim in order to overcome the time limitations on filing a motion to reopen in order to raise his claim for adjustment of status to that of an alien admitted for permanent residence. A.R. 40-41.

The IJ also determined that the approved visa petition did not justify reopening. A.R. 40-41. The IJ suggested that petitioner would not warrant a favorable exercise of discretion because he "has known of the pendency of his deportation proceedings since 1996," "was made aware that he was ordered deported in 1997," "was notified that his appeal was dismissed in 2002," and "only c[ame] forward after a new form of relief has become available in 2006." A.R. 41.

5. Petitioner appealed to the Board, arguing that reopening was justified based on changed circumstances that made him eligible for asylum, withholding of removal, or CAT relief. Pet. App. 25a; A.R. 12-19. Petitioner abandoned the argument that reopening was warranted in order to allow him to pursue adjustment of status. Pet. App. 2a; A.R. 12-19.

The Board dismissed the appeal. Pet. App. 22a-26a. It first determined that the IJ lacked jurisdiction to consider petitioner's second motion to reopen because the Board "was last to render a decision in this matter." *Id.* at 23a; see 8 C.F.R. 1003.2(a) (providing that "[a] request to reopen or reconsider any case in which a decision has been made by the Board * * * must be in the form of a written motion to the Board").

The Board then concluded that reopening was not warranted because petitioner failed to demonstrate material changed circumstances that would make him *prima facie* eligible for relief from removal. Pet. App. 24a-26a. The Board rejected petitioner's claim that he would be persecuted in Albania because he had been a supporter of the Democratic Party, explaining that conditions in Albania had improved since petitioner left. *Id.* at 24a-25a. The Democratic Party "participates in the political system and holds seats in Parliament, and the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a. The Board observed that the Albanian Constitution "provides citizens with the right to change their government peacefully, and citizens exercised this right in practice," with "no confirmed cases of people being killed or detained strictly for political reasons." *Ibid.* The Board also noted that "there had been no major outbreaks of political violence since 1998" and that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents." *Id.* at 25a n.1. The Board concluded that, "[b]ased on the evidence submitted," petitioner failed to demonstrate material changed circumstances that would make him eligible for the relief from removal he sought. *Id.* at 25a-26a.

6. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-21a. The court determined that the Board's denial of reopening would be reviewed only for an abuse of discretion and that "[i]t is difficult to perceive an abuse of discretion" here. *Id.* at 3a. The court noted that "[n]o statute requires the Board to reopen under *any* circumstances, and a regulation confirms that the Board has discretion to deny relief even to an alien who would have received a favorable decision,

had the argument been presented earlier." *Ibid.* (citing 8 C.F.R. 1003.2(a)). The court then explained that petitioner's primary argument was that the Board erred in failing to explicitly address one affidavit included with his motion to reopen, but that affidavit "does not document a change in Albanian conditions since 1997; it is instead a historical narrative reaching back to the time when Albania was a totalitarian dictatorship." *Ibid.*

The court went on to hold, however, that it lacked jurisdiction to consider petitioner's claim under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 3a-12a. It explained that the Board's decision to grant or deny a motion to reopen is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on a regulation that the Attorney General promulgated to authorize the Board to reopen proceedings, which in turn specifies that the power to grant or deny a motion to reopen is within the discretion of the Board. Pet. App. 4a-7a. In so holding, the court overruled its prior decision in *Singh* v. *Gonzales*, 404 F.3d 1024 (7th Cir. 2005). Pet. App. 7a-10a.

The court acknowledged that it retained jurisdiction over questions of law and constitutional claims under 8 U.S.C. 1252(a)(2)(D), but it determined that petitioner did not raise any such contention, because his "entire argument is that the Board abused its discretion." Pet. App. 9a-10a.

Finally, the court rejected petitioner's argument that reopening was warranted based on his approved visa

petition, explaining that petitioner had failed to present that claim to the Board. Pet. App. 11a-12a.[2]

Judge Ripple concurred but suggested that 8 U.S.C. 1252(a)(2)(B)(ii) should be limited to "procedural rulings." Pet. App. 12a-15a. Judge Cudahy dissented, contending that the court has jurisdiction because "there is no statutory language suggesting the level of deference to be afforded a denial of a motion to reopen." *Id.* at 15a-20a.

The panel had circulated its decision to the full court of appeals. Pet. App. 10a. Five judges voted to rehear the case en banc. *Ibid.*; see *id.* at 20a-21a (Ripple, J., dissenting from denial of rehearing en banc).

## ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the Board's denial of his motion to reopen immigration proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner could not in any event show that the Board abused its discretion in denying his motion to reopen and could not show eligibility for asylum, withholding of removal, or CAT relief, petitioner could not ultimately succeed on the merits of his challenge to the removal order. This Court recently denied review of the same issue in *Jezierski* v. *Holder*,

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[2] Petitioner initially argued to the court of appeals that the Board should have reopened his case based on his approved visa petition, Pet. C.A. Br. 16-17, but he later conceded that he had failed to exhaust that claim, Pet. C.A. Supp. Br. 2.

No. 08-656 (Mar. 23, 2009), and there is no reason for a different result here.

1. a. In the decision below, the Seventh Circuit held that it lacks jurisdiction to consider the Board's denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 4a-5a. In reaching that conclusion, the Seventh Circuit reasoned that the Board's decision to grant or deny a motion to reopen is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on a regulation that the Attorney General promulgated to authorize the Board to reopen proceedings, which in turn specifies that the power to grant or deny a motion to reopen is within the discretion of the Board. Pet. App. 4a-7a.

The Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits have reached a contrary conclusion, holding that 8 U.S.C. 1252(a)(2)(B)(ii) does not bar judicial review of the Board's denial of a motion to reopen. See *Singh* v. *Mukasey*, 536 F.3d 149, 153-154 (2d Cir. 2008); *Jahjaga* v. *Attorney Gen. of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zhao* v. *Gonzales*, 404 F.3d 295, 302-303 (5th Cir. 2005); *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528-529 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004).[3]

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[3] See also, *e.g.*, *Manzano-Garcia* v. *Gonzales*, 413 F.3d 462, 465-466 (5th Cir. 2005). Petitioner also cites (Pet. 19) *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1361 (11th Cir. 2006), and *Thongphilack* v. *Gonzales*, 506 F.3d 1207, 1209-1210 (10th Cir. 2007). *Zafar* addressed whether Section 1252(a)(2)(B)(ii) bars judicial review of a challenge to a denial of a motion for continuance, and it therefore does not shed light on whether there is jurisdiction in this case, which is limited to the

The Second, Fifth, Eighth, and Ninth Circuits have explained that a decision by the Board to grant or deny a motion to reopen is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because the Board's discretionary authority to act on a motion to reopen is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Singh* v. *Mukasey*, 536 F.3d at 153-154; *Miah*, 519 F.3d at 789 n.1; *Medina-Morales*, 371 F.3d at 528-529. The Tenth Circuit has reached the same result through a different analysis, concluding that Section 1252(a)(2)(B)(ii) does not preclude jurisdiction over a motion to reopen because "[a] motion to reopen * * * is separately authorized by 8 U.S.C. § 1229a(c)(6)" and because 8 U.S.C. 1252(b)(6), which directs courts to consolidate appeals of denials of motions to reopen with appeals of the order sought to be reopened, assumes that courts of appeals generally have jurisdiction to review denials of motions to reopen. *Infanzon*, 386 F.3d at 1361-1362. The Third Circuit has come to the same conclusion in the context of a motion to reissue a Board decision, which it treated as a motion to reopen. See *Jahjaga*, 512 F.3d at 82.[4]

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specific context of motions to reopen. *Thongphilack* does not address the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the Board's denial of a motion to reopen.

[4] Contrary to petitioner's contention (Pet. 16), the decision below does not conflict with any decision of this Court. Petitioner never argued below that any ambiguities in 8 U.S.C. 1252(a)(2)(B)(ii) should be resolved in favor of the alien, and the court of appeals accordingly did not consider that issue. And the decision below does not conflict with this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001). *St. Cyr* did not consider the question presented here, and, as the court of

b. After reexamining its prior filings on this issue, the government has concluded that the majority position represents the better reading of the statute. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a motion to reopen immigration proceedings—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

Although the relevant statutory "subchapter" provides that "[a]n alien may file one motion to reopen," 8 U.S.C. 1229a(c)(7)(A); specifies that the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material," 8 U.S.C. 1229a(c)(7)(B); and provides a deadline for the filing of such a motion, 8 U.S.C. 1229a(c)(7)(C), it does not "specif[y]" that motions to reopen may be granted "in the discretion of the Attorney General." Rather, a regulation provides that the Board has broad discretion to grant or deny a motion to reopen. See 8 C.F.R. 1003.2(a) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board * * * . The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief."); see also 8 C.F.R. 1003.23(b)(3) (IJ has discretion to grant or deny motion to reopen). Given the general presumption in favor of judicial review, *St. Cyr*, 533 U.S. at 298, and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that the Board's

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appeals explained, the statute does not preclude judicial review, because Congress expressly preserved review of constitutional claims and questions of law in 8 U.S.C. 1252(a)(2)(D). Pet. App. 9a-10a.

discretionary decision to deny a motion to reopen is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 13-24; Gov't C.A. Supp. Br. 2-10.

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertion, Pet. 19-20, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the question concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

In its decision in this case, the Seventh Circuit overruled *Singh* v. *Gonzales*, *supra*, which held that Section 1252(a)(2)(B)(ii) does not preclude judicial review of the denial of a motion to reopen immigration proceedings. Pet. App. 10a. The opinion states that it had "been circulated * * * to all active judges" and that "[a] majority did not favor a hearing en banc"; the opinion also noted, however, that five judges had voted to rehear the case en banc. *Ibid.* There accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented en banc.

Further, the court below did not have the opportunity to fully consider the government's position on the question presented. Although the government did state its view that Section 1252(a)(2)(B)(ii) permits judicial review of a denial of a motion to reopen in supplemental briefing in this case, the government's analysis rested in large part on the court of appeals' prior decision in *Singh*. See Gov't C.A. Supp. Br. 4-7. Because the court of appeals in this case did not have the benefit of the gov-

ernment's statutory analysis on the question presented, it would be prudent for this Court to decline to address the issue at this time.

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural feature of the conduct of removal proceedings. The Board's denial of a motion to reopen is reviewable only for abuse of discretion, a highly deferential standard. *Doherty*, 502 U.S. at 323. Under that standard, the court will defer to the Board's ruling unless the ruling inexplicably departs from established policies, was made without rational explanation, or rested on an impermissible basis. See, *e.g.*, *Pelinkovic* v. *Ashcroft*, 366 F.3d 532, 536 (7th Cir. 2004).

The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The Board manifestly did not abuse its discretion in denying the motion to reopen here. See pp. 14-16, *infra*. Nor is this case unusual in that respect: In fact, in almost all of the decisions petitioner cites that reviewed the Board's denial of a motion to reopen, Pet. 19, the courts concluded that the Board did not abuse its broad discretion in denying the motion to reopen. See *Singh* v. *Mukasey*, 536 F.3d at 154-155; *Miah*, 519 F.3d at 789-790; *Manzano-Garcia*, 413 F.3d at 469-470; *Medina-Morales*, 371 F.3d at 529-531; *Thongphilack*, 506 F.3d at 1209-1211. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

a. First, the claim upon which petitioner sought to obtain review in the court of appeals—that the Board

abused its discretion in denying his motion to reopen immigration proceedings—is meritless. In his motion to reopen, petitioner argued that he had new, material, previously unavailable evidence that established his *prima facie* eligibility for asylum, withholding of removal, and CAT relief because he was "still a target of attack in Albania" due to his membership in the Democratic Party in the early 1990s. A.R. 48-50, 52-56.

After reviewing the evidence petitioner presented, the Board disagreed. Pet. App. 22a-26a. It explained that the Democratic Party "participates in the political system and holds seats in Parliament, and the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a. The Board also observed that "there ha[ve] been no major outbreaks of political violence since 1998"; that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents"; and that Albanian citizens have been exercising their right to "change their government peacefully" without any "people being killed or detained strictly for political reasons." *Id.* at 24a-25a & n.1.

Although the court of appeals dismissed the petition for review on jurisdictional grounds, it observed that it otherwise would review the denial of a motion to reopen for an abuse of discretion. The court noted that it would be "difficult to perceive an abuse of discretion" in this case, because petitioner's argument was that the Board erred in failing to explicitly address one affidavit, yet that affidavit "does not document a change in Albanian conditions since 1997; it is instead a historical narrative reaching back to the time when Albania was a totalitarian dictatorship." Pet. App. 3a.

It is well-settled that, in a motion to reopen based on changed country conditions, the movant must show that the conditions in his home country have changed between the time of the first removal order and the motion to reopen. See, *e.g.*, *Patel* v. *Gonzales*, 442 F.3d 1011, 1017 (7th Cir. 2006). The Board determined that petitioner failed to make that showing, and it stated that it had considered "the evidence [petitioner] submitted." Pet. App. 25a. And, although the court of appeals dismissed the appeal on jurisdictional grounds, it made clear its view that the Board's decision was not an abuse of discretion because petitioner had not demonstrated changed conditions that would make him eligible for asylum, withholding of removal, or CAT relief. *Id.* at 3a. Indeed, as the court noted, even if petitioner had established eligibility for such relief, the Board could nonetheless deny his motion to reopen in its broad discretion. See *ibid.* (citing 8 C.F.R. 1003.2(a)). Petitioner does not contend in his petition that the Board abused its discretion in denying his motion to reopen. There is, accordingly, no reasonable prospect that the court of appeals would conclude that the Board abused its discretion in denying petitioner's motion to reopen.[5]

b. Even if the court of appeals had exercised jurisdiction and determined that the Board should have reopened petitioner's proceedings, it is extremely unlikely

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[5] Petitioner also sought to reopen his case based on the approved visa petition, but he failed to present that claim to the Board, and the court of appeals therefore determined that he could not challenge the Board's decision on that basis. See Pet. App. 11a-12a; see 8 U.S.C. 1252(d)(1) (requiring alien to exhaust claim by raising it to the Board). Petitioner conceded that he had failed to exhaust that claim with the Board, Pet. C.A. Supp. Br. 2, and he does not attempt to revive that claim before this Court.

that the agency would grant petitioner asylum, withholding of removal, or relief under the CAT.

To establish eligibility for asylum, an alien must demonstrate past persecution or a well-founded fear of future persecution on account of a protected ground. See 8 U.S.C. 1101(a)(42)(A); 8 C.F.R. 1208.13(b)(1) and (2). To establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987). Under either standard, "acts of private citizens do not constitute persecution unless the government is complicit in those acts or is unable or unwilling to take steps to prevent them." *Ingmantoro* v. *Mukasey*, 550 F.3d 646, 650 (7th Cir. 2008) (citation omitted).

To obtain protection under the CAT, an alien must demonstrate that it is more likely than not that he would be tortured in the country of removal. 8 C.F.R. 1208.16(c). The acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1).

As the Board explained, petitioner cannot demonstrate that he would be persecuted or tortured by the government or with government acquiescence if returned to Albania. It is extremely unlikely that petitioner would be persecuted or tortured based on his membership in the Democratic Party, because members of that party hold important positions in the Albanian government, including the position of Prime Minister. Pet. App. 24a. Although petitioner contends (Pet. 12) that "he would be in danger of being beaten or murdered" if returned to Albania, the Board found that

"there ha[ve] been no major outbreaks of political violence since 1998"; that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents"; and that Albanian citizens have been exercising their right to "change their government peacefully" without any "people being killed or detained strictly for political reasons." Pet. App. 24a-25a & n.1. See, *e.g.*, *Bejko* v. *Gonzales*, 468 F.3d 482, 486-487 (7th Cir. 2006) (while "serious political repression existed in the past" in Albania, "there ha[ve] been no major outbreaks of political violence since 1998" and "the available evidence[] suggests that neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents"); *Hoxhallari* v. *Gonzales*, 468 F.3d 179, 188 (2d Cir. 2006) (denying petition for review of an active supporter of the Albanian Democratic Party based on the agency's finding that country conditions changed for the better in Albania "beginning in 1990").

Because petitioner is unlikely to be granted any of the underlying forms of relief that he seeks, this case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a motion to reopen. For that reason as well, further review is unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# REPLY BRIEF

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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

AGRON KUCANA, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF

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## ARGUMENT

### Introduction

The government's brief disregards the strong statement by Judges Ripple, Rovner, Wood and Williams, that not rehearing *Kucana* en banc, "take[s] the Circuit down a path so contrary to the manifest intent of Congress and to the Supreme Court's understanding of that intent. If we take such a course, our decision will no doubt warrant close scrutiny by the Supreme Court. *See* Sup. Ct. R. 10." *Kucana v. Mukasey*, 533 F.3d 534, 542 (7th Cir. 2008), Ripple, Rovner, Wood and Williams, J.J., dissenting from the denial of a rehearing en banc. Certainly these four Seventh Circuit judges believe that certiorari should be granted.

### I. REVIEW IS NOT PREMATURE

The government first argues that certiorari should be denied because review of the jurisdictional issue is premature. It is not premature to resolve the conflict created by the Seventh Circuit's decision in this case. Not only the petitioner, but the government and every other circuit which has reached the issue has concluded that jurisdiction exists. The government acknowledges that the Second, Fifth, Eighth, Ninth and Tenth Circuits have so held. The Third and Eleventh Circuits have also concluded that jurisdiction exists because the statute, 8 U.S.C. 1252(a)(2)(B), does not specify that the motion is excluded. *See Jahjaga v. Attorney General of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zafar v. U.S. Attorney General*, 461 F.3d 1357, 1361 (11th Cir. 2006). The Seventh Circuit is clearly wrong on a matter which affects the structural

integrity of the judicial system, jurisdiction, and which affects people's lives, the legal right to remain in this country.

Contrary to the government's downplaying the importance of the judicial procedure involved here, a motion to reopen, in *Dada v. Mukasey*, 128 S.Ct. 2307, 2318, 171 L.Ed.2d 178 (2008), this Court described motions to reopen as an "important safeguard" to "ensure a proper and lawful disposition." The government is not heeding that admonition.

The government notes that certiorari was recently denied in *Jezierski v. Holder*. But, it is this case, not *Jezierski*, where the Seventh Circuit took its jurisdictional position, overruling its prior decision in *Singh v. Gonzales*, 404 F.3d 1024 (7th Cir. 2005). In this case, the government filed a supplemental brief telling the Seventh Circuit that there was jurisdiction. In contrast, in *Jezierski*, the government acknowledged in its brief in opposition to the petition for certiorari that it "did not argue that the court lacked jurisdiction" in the Seventh Circuit. 2009 WL 420584, p.10, n.2.; *see* 2008 WL 2116454.

*Kucana v. Mukasey* is the leading case in the Seventh Circuit on this jurisdictional issue. In less than a year, it has been cited in twenty-two Seventh Circuit decisions, a number of which involved multiple cases consolidated on appeal. In contrast, because it is wrong on the scope of appellate jurisdiction, *Kucana v. Mukasey* has not been cited outside of the Seventh Circuit.

Of those twenty-two cases, *Kucana v. Mukasey* was dispositive of the entire case, or of one or more issues raised by the alien, fifteen times, including *Jezierski*. *Malik v. Holder*, 2009 WL 667224 (7th Cir. 2009); *Mohinudeen v. Holder*, 2009 WL 613021, 1 (7th Cir. 2009) ("Because this court lacks jurisdiction to review discretionary decisions by the Board, see Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008), we dismiss the petition for lack of jurisdiction."); *Chen v. Holder*, 2009 WL 465788, 1 (7th Cir. 2009) ("Because this court lacks jurisdiction to review discretionary decisions by the Board, see Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008), we dismiss the petition for lack of jurisdiction."); *Xu v. Holder*, 2009 WL 465105, 1 (7th Cir. 2009) ("But under Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008), we lack jurisdiction to review the BIA's discretionary determination that conditions have or have not changed."); *Duad v. U.S.*, 556 F.3d 592 (7th Cir. 2009); *Patel v. Mukasey*, 298 Fed.Appx. 525, 2008 WL 4866890 (7th Cir. 2008); *Adebowale v. Mukasey*, 546 F.3d 893 (7th Cir. 2008); *Johnson v. Mukasey*, 546 F.3d 403, 404 (7th Cir. 2008) ("Because (as we shall see) he does not present a question of law or a colorable constitutional claim, the denial of his motion, so far as it seeks reopening, is outside our jurisdiction to review. Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008)."); *Jezierski v. Mukasey*, 543 F.3d 886 (7th Cir. 2008); *Sharashidze v. Mukasey*, 542 F.3d 1177, 1179 (7th Cir. 2008) ("The jurisdictional bar against factual arguments defeats most of Sharashidze's other arguments. See Kucana v. Mukasey, 533 F.3d 534, 2008 WL 2639039 (7th Cir.2008)."); *Mitreva v. Mukasey*, 291 Fed.Appx. 780, 781-782, 2008 WL 4093567 (7th Cir. 2008); *Yan Zhen Yang v. Mukasey*, 289 Fed.Appx. 132, 2008 WL 3852744 (7th Cir. 2008); *Fontus v. Mukasey*, 290

Fed.Appx. 922, 923, 2008 WL 2906762, 1 (7th Cir. 2008) ("Fontus argues in this court that the Board abused its discretion by denying his motion to reopen. Claims of abuse of discretion in dealing with motions to reopen are outside this court's jurisdiction. Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008)"); *Rizvi v. Mukasey*, 285 Fed.Appx. 287, 289, 2008 WL 2906764, 1 (7th Cir. 2008) ("Rizvi contends that the Board abused its discretion by denying his third motion to reopen, but claims of abuse of discretion in dealing with motions to reopen fall outside this court's jurisdiction. Kucana v. Mukasey, 533 F.3d 534 (7th Cir.2008)"); *Huang v. Mukasey*, 534 F.3d 618 (7th Cir. 2008) (dismissing two of the four consolidated petitions for lack of jurisdiction).

The government suggests that it would be prudent to give it the opportunity to present its revised statutory analysis to the Seventh Circuit, so that the Seventh Circuit will change its position and overrule its decision in this case. Aside from that not providing Kucana with the appellate process to which he is entitled, the government's suggestion is wholly unrealistic.

Indeed, the trend in the Seventh Circuit is to no longer even publish these decisions dismissing for lack of jurisdiction, sometimes deeming oral argument unnecessary. *See Malik v. Holder*, 2009 WL 667224 (7th Cir. 2009); *Mohinudeen v. Holder*, 2009 WL 613021 (7th Cir. 2009); *Chen v. Holder*, 2009 WL 465788 (7th Cir. 2009); *Xu v. Holder*, 2009 WL 465105, 1 (7th Cir. 2009). In other words, finding no jurisdiction, based on *Kucana v. Mukasey*, has become a matter of routine in the Seventh Circuit.

As noted above, in reaching its decision in this case, the Seventh Circuit overruled its prior decision in *Singh v. Gonzales*, *supra*. It knew its holding placed it in "a minority within the minority, giving the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip [courts] of [their] jurisdiction" and that its position was "isolated." *Kucana v. Mukasey*, 533 F.3d 534, 540 (7th Cir. 2008), Cudahy, J. dissenting. The Seventh Circuit was undoubtedly aware of the analysis employed by the other circuits to reach their contrary conclusions. The government's statutory analysis is not unique. An explanation from the government will not result in an epiphany.

Furthermore, the government has already had the opportunity to provide its revised statutory analysis to the Seventh Circuit. In *Malik v. Holder*, *supra*, the Seventh Circuit ordered the government to brief the jurisdictional issue. *Id.*, Docket No. 08-2846, Item 4, July 25, 2008. In response, the government footnoted its disagreement with the *Kucana* decision, but cited it as controlling precedent to dismiss for lack of jurisdiction. *Id.*, Docket No. 08-2846, Item 17, Dec. 22, 2008. That brief was filed on December 22, 2008, more than two months after the petition for certiorari was filed in this case, and more than a month after the petition for certiorari was filed in *Jezierski*.

So, the government has already had the opportunity to present its revised statutory analysis to the Seventh Circuit, but chose not to do so. In what case would the government choose to really argue the jurisdictional issue to the Seventh Circuit and when

would that be? In its brief, the government seems to tie the significance of appellate jurisdiction to the alien's ultimate chance of success on the merits of the underlying substantive issue. (See Section II, *infra*.) It is likely to be a long wait before a case arises where the government deems that condition to be met. The reality is that the government is satisfied with the Seventh Circuit's results, the alien does not get relief, even though it ethically acknowledges disagreement with the way in which the Seventh Circuit reaches those results. The government's argument that certiorari is premature rings hollow.

## II. THE GOVERNMENT'S EFFORT TO TIE CERTIORARI TO THE PETITIONER'S ULTIMATE CHANCE FOR SUCCESS ON THE MERITS IS INAPPROPRIATE.

The government's second argument is that Kucana will ultimately lose even if he receives an appellate review. That argument is inappropriate. This is neither the time, nor the forum, to argue the underlying merits of Kucana's motion to reopen the immigration proceedings or of his right remain in the United States. (However, it should be noted that Judge Easterbrook's opinion appears to mischaracterize the affidavit of Professor Fisher submitted in support of Kucana's motion. Compare Appendix A, p. 3a and JA 113-15 and 120-21.)

The question presented for review is purely one of federal jurisdiction. Therefore, even if certiorari is granted, it would be entirely improper to argue the merits of the underlying motion to reopen or to argue whether conditions in Albania are such that Kucana is

legally entitled to remain in this Country. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips*, 510 U.S. 27, 31-34, 114 S.Ct. 425, 126 L.Ed2d 396 (1993); S.Ct. R.14.1(a). Since the substance of Kucana's arguments on those issues are outside the scope of the petition before this Court, and would remain outside the scope of this Court's review if certiorari is granted, then it logically follows that they should not factor into determining whether to grant certiorari.

Just as the critical importance of a fair trial is never affected by prejudging guilt, so too the importance of jurisdiction and access to appellate review can never be affected by prejudging whether the petitioner will prevail. The government's argument to the contrary should be rejected.

## III AT A MINIMUM, LOWER COURT DECISION MUST BE VACATED

Even if the Court does not choose to grant full review, at a minimum, the Court should grant the petition, vacate the lower court decision, and remand for reconsideration of the government's decision. *See Lawrence v Chater*, 516 U.S. 163, 174-75, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (per curiam).

## CONCLUSION

In light of the need for uniformity among the circuits on an important matter of federal jurisdiction, the petition for certiorari should be granted.

Respectfully submitted,

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# JOINT APPENDIX

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No. 08-911

Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States

AGRON KUCANA,
*Petitioner,*

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 3, 2008
CERTIORARI GRANTED APRIL 27, 2009

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**General Docket**
**United States Court of Appeals**
**for the Seventh Circuit**

Court of Appeals Docket #: 07-1002 Filed: 1/3/07
Appeal from: Board of Immigration Appeals

AGRON KUCANA,
Petitioner,
v.
MICHAEL B. MUKASEY, Attorney General,
Respondent.

| | |
|---|---|
| Jan. 3, 2007 | Petition for Review docketed with proof of service, pursuant to FRAP 15(c). Filed an Original and 3c of petitioner's Petition for Review. [07-1002] [2060437-1] Agency record or cert. list due on 2/12/07. (hudk) |
| Feb. 5, 2007 | Agency record on appeal filed. Contents of record: 1 vol. administrative record contained on CD. [07-1002] [2071557-1] The first brief in this appeal is due 3/19/07 for Agron Kucana. (linj) |
| Mar. 20, 2007 | Filed 15c agency #1 brief by Petitioner Agron Kucana. Disk filed. [07-1002] [0-0] Second agency brief is due 4/19/07 for Alberto R. Gonzales. (leti) |
| Mar. 20, 2007 | Filed 10c joint appendix vols. I and II by Petitioner Agron Kucana, Respondent Alberto R. Gonzales. [07-1002] [2088391-1] (leti) |

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| May 22, 2007 | Filed 15c agency #2 brief by Respondent Alberto R. Gonzales. Disk filed. [07-1002] [0-0] (kare) |
| June 8, 2007 | ORDER: Argument set for Tuesday, August 7, 2007 at 10:30 a.m. Each side limited to 10 minutes. [07-1002] [2110966-1] (andb) |
| Oct. 15, 2007 | ORDER: Argument set for Thursday, December 6, 2007 at 10:00 a.m. Each side limited to 10 minutes. [07-1002] [2151129-1] (trot) |
| Dec. 6, 2007 | Case heard and taken under advisement by panel: Chief Judge Frank H. Easterbrook, Circuit Judge Richard D. Cudahy, Circuit Judge Kenneth F. Ripple. [07-1002] [2168004-1] (rosa) |
| Dec. 6, 2007 | Case argued by Michael R. Lang for Petitioner Agron Kucana, Kathryn DeAngelis for Respondent Michael B. Mukasey, Respondent Peter D. Keisler, Respondent Alberto R. Gonzales. [07-1002] [2060437-1] (rosa) |
| Dec. 6, 2007 | ORAL ORDER from the bench requesting no later than December 17, 2007, counsel for both sides must file memoranda discussing this court's subject-matter jurisdiction in light of Ali v. Gonzales, 502 F.3d 659 (7th Cir. 2007), and the fact that the petition contends that the Board abused its discretion in declining to reopen the proceedings but does not appear to contend that the Board has |

misinterpreted a statute or the Constitution. See also ICC v. Locomotive Engineers, 482 U.S. 270, 282 (1987). The memoranda should consider whether the court may have jurisdiction with respect to the asylum issue but not the I-130 issue, or the reverse. [07-1002] [2060437-1] (amyd)

Dec. 17, 2007 — Filed Respondent Michael B. Mukasey response to the court's order for supplemental briefing. [2060437-1] [07-1002] (alys)

Dec. 28, 2007 — Filed Petitioner Agron Kucana supplemental memorandum to briefing. [07-1002] [2060437-1] (mank)

July 7, 2008 — Filed opinion of the court by Chief Judge Easterbrook. The Petition for Review is DISMISSED for lack of jurisdiction. We conclude that Singh must be overruled to the extent it holds Section 1252(a)(2)(B)(ii) inapplicable to discretionary reopening decisions. This opinion has been circulated under Circuit Rule 40(e) to all active judges. A majority did not favor a hearing en banc. (Judges Flaum, Ripple, Rovner, Wood, and Williams voted in favor of a hearing en banc.) Chief Judge Frank H. Easterbrook, Circuit Judge Richard D. Cudahy, dissenting, Circuit Judge Kenneth F. Ripple, concurring, dubitante. Circuit Judge Ripple, with whom Circuit Judges

| | |
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| | Rovner, Wood and Williams join, dissenting from the denial of a rehearing en banc. [07-1002] [2060437-1] (amyd) |
| July 7, 2008 | ORDER: Final judgment filed per opinion. With costs: y. [07-1002] [2231561-1] (amyd) |
| Jan. 26, 2909 | Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 08-911. [07-1002] [2247081-1] (mank) |
| Apr. 30, 2009 | Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 08-911. [07-1002] [2248465-1] (fern) |

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**CHICAGO, ILLINOIS**

File: A73-428-513 Date: July 11, 2006

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| Agron KUCANA, | ) | IN ***DEPORTATION*** |
| | ) | PROCEEDINGS |
| Respondent | ) | |

Charge: Section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(B) — remained longer than authorized.

Application: Second Motion to Reopen and Rescind *In Absentia* Deportation Order

ON BEHALF OF THE RESPONDENT:
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ON BEHALF OF THE D.H.S.:
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Chicago, Illinois 60603

## DECISION OF THE IMMIGRATION JUDGE

The respondent, a 38 year old male native and citizen of Albania, entered the United States as a

visitor at New York, New York, on July 12, 1995. He overstayed his visitor visa and he was placed in deportation proceedings through the issuance of an Order to Show Cause on June 26, 1996. *See Exhibit 1* (Order to Show Cause and Notice of Hearing) (hereinafter "OSC").[1] He is charged with deportability pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (hereinafter "Act"). The respondent has acknowledged receipt of the OSC.

At a Master Calendar hearing conducted on October 15, 1996, the respondent, through counsel, admitted each of the factual allegations on the OSC and conceded deportability as charged. He then requested a review of his previously filed request for asylum and withholding of removal (Form I-589 - *Exhibit 2*).[2] A hearing on the merits of his application for relief from deportation was eventually scheduled for October 9, 1997. On October 9, 1997, respondent's counsel appeared for the hearing at the scheduled time, but the respondent did not. The Immigration Judge thereupon entered an order of deportation *in absentia* against the respondent.

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[1] The OSC was filed with the Immigration Court on July 1, 1996.

[2] The respondent initially filed his application for asylum with the INS Asylum Office on May 3, 1996. However, the Asylum Office did not grant the respondent's application and, on June 26, 1996, referred the application, along with the OSC, to the Immigration Court for further review.

On October 15, 1997, the respondent's counsel filed a motion to reopen explaining that his client had failed to appear because he had been overly tired and stressed about his deportation case, therefore causing him to oversleep on the day of the hearing. In a written decision issued on February 17, 1998, the Immigration Judge denied the motion to reopen finding that the respondent had failed to demonstrate the requisite "exceptional circumstances" warranting reopening under INA Sections 242B(c)(3)(A), and (f)(2). The respondent filed an appeal of said denial to the Board of Immigration Appeals ("BIA") on March 16, 1998. However, on May 7, 2002, the BIA dismissed the respondent's appeal, allowing the *in absentia* order of deportation to Albania to stand.

On June 22, 2006, nearly four years after the BIA's dismissal of his appeal, the respondent filed a second motion to reopen his deportation order on the basis of what he claims is newly obtained evidence and changed country conditions in Albania. He also wishes to pursue adjustment of status since a visa petition filed on his behalf in January 1999 is now current.[3] The respondent states in his motion that

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[3] The respondent's mother, Remzie Kucana, filed an immigrant visa petition on his behalf back in 1999 when she acquired lawful permanent resident status. The petition was filed under the provisions of INA Section 203(a)(2)(B)(unmarried son or daughter of permanent resident alien). The petition was approved on May 18, 2002. However, the mere approval of a visa petition does not automatically entitle the beneficiary to an immigrant visa. This "preference category" typically requires a

"this newly discovered evidence . . . states new facts directly related to well-founded fear of future persecution and past persecution and based on [respondent's] political opinion membership in a particular social group as a person affiliated with the democratic party..." *See Respondent's Motion to Reopen, paragraph 11.* The new evidence consists of:

1) an affidavit from an uncle who was granted asylum in the United States in July 2001;

2) an affidavit from Elez Biberaj, Ph.D, Managing Editor Eurasia Division of the Voice of America, stating that he is a personal acquaintance of the respondent and explaining that the political violence that has plagued Albania both before and after 1997 puts the respondent in danger if returned to that country;

3) several Albanian newspaper articles demonstrating the ongoing political violence in Albania;

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several year wait for the visa priority date to become current due to Congressionally imposed numerical limitations on the issuance of such visas.

In this case, the respondent's mother naturalized, thus converting respondent's "preference category" to "F-1 - unmarried son of a United States citizen." *See* INA Section 203(a)(1). His visa number thus became current, leading to his request that he be allowed to adjust his status in the United States rather than being required to leave the country to pursue consular processing for the visa overseas.

4) the 2005 Department of State Country Report on Albania;

5) an affidavit from Bernd Fischer, Ph.D. in Balkan History, disputing the 2005 State Department Report on Albania, concluding that the past threats received by respondent from "individuals he believes to be political activists" and the respondent's past detention and receipt of threats by the police, demonstrate past persecution and a well founded fear of future persecution;

6) INS documents reflecting approval of a visa petition filed by respondent's mother on his behalf; and

7) respondent's own updated affidavit regarding his fear of return to Albania.

The Department of Homeland Security (formerly known as the INS) opposes reopening on the basis that the respondent has been a fugitive since May 7, 2002 and is therefore not entitled to any grant of discretionary relief. Also, the DHS cites to the respondent's erroneous reliance on 8 C.F.R. Sections 3.23(b)(4)(i) and 1003.2(c)(3)(ii) as the controlling provisions regarding reopening in this matter. The DHS argues that the reopening of *in absentia deportation* hearings is controlled by 8 C.F.R. Section 1003.23(b)(4)(iii) which strictly limits reopening of in absentia orders and does not include "changed circumstances" as a basis for reopening.

## ANALYSIS

A motion to reopen an *in absentia* deportation order may be granted upon a showing that the alien did not receive notice an accordance with section 242B(a)(2) of the Immigration and Naturalization Act (Act). *See* INA § 242(c)(3)(B). The respondent is not arguing lack of notice as a basis for reopening.

A motion to reopen an *in absentia* deportation order may also be granted upon a showing by the respondent that the failure to appear was due to "exceptional circumstances." *See* INA § 242B(c)(3)(A). The term "exceptional circumstances" refers to circumstances beyond the alien's control, such as a serious illness of the alien or a death of the alien's immediate family, but does not include less compelling circumstances. *See* INA § 242B(f)(2); *see also In re Shaar*, 21 I&N Dec. 541 (BIA 1996). A motion to reopen an *in absentia* proceeding based on any other contention than inadequate notice must be filed within 180 days of the date of the order of deportation. *See* 8 C.F.R. § 1003.23(b)(4)(iii)(A).

The respondent's first motion to reopen was filed within the requisite 180 days of the date of the Immigration Judge's decision. Unfortunately, it was denied and the respondent was unsuccessful in his appeal to the BIA. It does not appear anywhere in the record that the respondent pursued any further review of the BIA's 2002 decision until this most recent filing of the second motion to reopen on June 26, 2006. The respondent has been the subject of an

administratively final order of deportation since May 7, 2002 and this second motion to reopen was filed four years after the BIA's dismissal of his appeal. Counsel for the respondent has not raised any argument, nor identified any authority, which suggests that the respondent should be exempted from the basic regulatory requirements which govern the filing of motions to reopen for *in absentia* deportation cases. While his first motion to reopen was timely, this second motion certainly is not.

Even if the respondent's motion had been timely filed, or exempted from filing deadlines, it would be denied because the evidence he has submitted in support of reopening fails to establish "exceptional circumstances." The evidence he has submitted is not "new" nor so significant as to impact the basis for his asylum claim as it was first filed in May of 1996. The respondent's application asserted fear of persecution on account of his involvement with the pro-democracy movement in Albania prior to his arrival in the United States. Today, this remains the basis for respondent's claim, albeit with additional documentation reflecting the ongoing dysfunctional nature of politics in Albania. The evidence presented by the respondent in his motion, e.g. his uncle's grant of asylum by INS in 2001 based on political activities occurring years earlier, is hardly "new evidence" and he fails to explain why he waited to present this fact in support of reopening until now. Also, the respondent conveniently neglects to mention that the Democratic Party won

Albania's most recent elections and that Sali Berisha - a candidate the respondent supported at the beginning of the post-Communist era many years ago - is now Albania's Prime Minister. The affidavits from Elez Biberaj, Ph.D, and Professor Bernd Fischer discuss the current government's difficulty in fighting crime and stopping political fighting but they do not reflect that this is a "new" event nor that the government of Albania actually participates in the violence or that it is utterly unable to stop it from occurring. In sum, the respondent has failed to establish that the social and political changes that have occurred in Albania since the BIA dismissed his appeal in 2002 amount to "exceptional circumstances" that could warrant reopening of the deportation hearing. With "due diligence" most of this evidence could have been discovered and presented much earlier. *Krougliak v. INS*, 289 F.3d 457, 460 (7th Cir. 2002). *See also Haile v. Gonzales*, 421 F.3d 493 (7th Cir. 2005) (discussing "new evidence" of changed country conditions). Moreover, I do not find that this evidence warrants reopening for purposes of seeking Convention Against Torture protection since it fails to make a prima facie showing that it is more likely than not that the government of Albania (or persons with whom it acquiesces) will take him into custody and torture him for purposes not recognized by the Convention.

A review of the respondent's asylum application as originally filed in 1996, and the ensuing affidavits he has filed in support of that

application, indicate that at one time he feared persecution at the hands of the Socialists in Albania. He later claimed a fear of persecution at the hands of the Democratic Party of Albania. It appears that he now believes he will be persecuted by either or both of the parties. This Court cannot help but question the sincerity of the respondent's asylum claim when the record is viewed in its totality. It appears that the respondent is coming forward today not because new evidence impacting his asylum claim has surfaced, but rather because, through the passage of time, a visa petition has now become current and he can seek to adjust his status on that basis. While this Court does not have the authority to invoke the "fugitive disentitlement doctrine" in these proceedings, it cannot help but comment that an alien who has known of the pendency of his deportation proceedings since 1996, who was made aware that he was ordered deported in 1997, who was notified that his appeal was dismissed in 2002, and who only comes forward after a new form of relief from removal has become available in 2006, is not one who should benefit from reopening and a favorable exercise of discretion. However, that issue remains to be resolved at a different level and by a different court. *See Sapoundjiev v. Ashcroft*, 384 F.3d 916 (7th Cir. 2004) (dismissing alien's petition for review under the "fugitive disentitlement doctrine").

Based on a review of the entire record, including respondent's supportive documentation

attached to the second motion to reopen, I conclude that the evidence, taken as a whole, fails to rise to the level of exceptional circumstances which would warrant reopening. *See In re Shaar*, 21 I&N Dec. 541 (BIA 1996). Given that the respondent has failed to satisfy the requirements for reopening these proceedings, the following order will be entered:

**ORDER OF THE IMMIGRATION JUDGE**

IT IS ORDERED that the respondent's motion to reopen deportation proceedings be DENIED.

/s/
JENNIE L. GIAMBASTIANI
IMMIGRATION JUDGE

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE OF IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**CHICAGO, ILLINOIS**

[stamped filed June 26, 2006]

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| | * | |
| **File: A 73-428-513** | * | |
| | * | |
| **IN THE MATTER OF** | * | **IN REMOVAL** |
| | * | |
| **AGRON KUCANA** | * | **PROCEEDINGS** |
| | * | |

**********

**MOTION TO REOPEN AND REMAND AND REMOVAL PROCEEDINGS BASED ON CHANGED COUNTRY CONDITIONS AND NEWLY DISCOVERED EVIDENCE**

Respondent, through counsel, Hiwot Michael, Esquire pursuant to **INA § 240(c)(6) 8 C.F.R. § 1003.2(c)(3)(ii)** and **8 C.F.R. §3.23(b)(4)(I)** and other legal authority cited herein, moves the Immigration Court to reopen his removal proceedings and allow him to apply for a political asylum under Section 208 of the INA, or withholding of removal under Section 241(b)(3) of the INA, and/or relief under the Convention against Torture under the Convention against Torture based upon changed country conditions. The motion to reopen states new facts

that will prove respondent's eligibility for asylum at a hearing if this matter is reopened. Attached to this motion is material evidence that was not available, could not have been obtained or presented at his former scheduled Individual hearing. In support of said motion, respondent states the following grounds, which are set forth fully in the accompanying Memorandum of Law, Affidavits and Exhibits.

1. That an order of removal was entered in absentia against the respondent on October 9, 1997 by the Immigration Judge.

2. That the respondent has previously filed a motion to reopen with the Immigration Court on Feb 17, 1998.

3. That the respondent is seeking to be granted asylum or for the reopening of his removal proceeding by Immigration Court for new Individual Hearing based on the newly discovered evidence that could not have been considered by the Immigration Judge at his scheduled Individual Hearing previously.

4. The respondent is also seeking the reopening of his case because this previously unavailable evidence establishes his well-founded fear of future persecution.

5. That, as shown in respondent's statement attached hereto, the respondent did not pursue his claim for a political asylum at the previously scheduled Individual hearing as he failed to show up at the scheduled Individual Hearing.

6. That the newly discovered evidence obtained by the respondent is highly probative and warrants a favorable exercise of the Court's discretion and that this evidence was obtained by respondent after his last scheduled hearing before the Immigration Judge.

7. That recent events in Albania as reflected in the most recent State department country report on Albania attached hereto reflect a new and continuing basis for the well-founded fear, clear probability that he will suffer persecution and torture in Albania. Moreover, as reflected in the record of this matter before the Court, it is more likely than not he will be tortured if arrested.

8. That evidence of these recent developments could not be previously presented at his Individual Hearing and the Court has not previously considered these facts as applicant was only considered for voluntary departure.

9. That due process of law dictates the Immigration Judge must consider this newly discovered evidence.

10. That the government will not suffer prejudice by the Court's decision to reopen respondent's removal proceeding for full evidentiary hearing.

11. That appellant is prima facie eligible for the relief he is seeking and his motion to reopen based on this newly discovered evidence that states new facts directly related to, well-founded fear of future persecution and past persecution and based on his

political opinion membership in a particular social group as a person affiliated with the democratic party should be granted.

12. That INS cannot overcome the presumption of a well-founded fear of future persecution in light of the past persecution suffered by respondent.

13. That since respondent's removal is imminent he requests that the Court stay his removal pending its decision on this motion.

14. That respondent is now a beneficiary of an approved I-130 filed by his U.S. citizen mother which is current, and is eligible for adjustment of status under the life act. (***See*, Exhibit H** )

**WHEREFORE**, respondent prays:

A. That the Court grants his motion to reopen.

B. That the Court grants a stay of the removal order entered on October 9, 1997 in the instant matter pending the final disposition of the instant motion.

C. For such other relief as justice and the nature of this cause requires.

RESPECTFULLY SUBMITTED,
FREKHTMAN AND ASSOCIATES

/s/
Hiwot Michael, Esquire
60 Bay 26th Street
Brooklyn, NY 11214
(718) 331-7700
Counsel for Respondent

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 22nd day of June 2006 a copy of the foregoing Motion to reopen and the memorandum in support was forwarded by regular mail postage prepaid to:

Office of the Chief Counsel
Department of Homeland Security
55 East Monroe St., Suite 1700
Chicago, IL 60603-5701

/s/
Hiwot Michael, Esquire

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE OF IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**CHICAGO, ILLINOIS**

| | | |
|---|---|---|
| **File: A 73-428-513** | * | |
| | * | |
| **IN THE MATTER OF** | * | **IN REMOVAL** |
| | * | |
| **AGRON KUCANA** | * | **PROCEEDINGS** |
| | * | |

**********

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO REOPEN AND REMAND REMOVAL PROCEEDINGS AND STAY EXECUTION OF THE ORDER OF REMOVAL**

## I. INTRODUCTION

The respondent is a 37 .year-old male native and citizen of Albania. He last entered the United States on B1/B2 visa on July 12, 1995 through New York, New York with authorization to stay until October 12, 1995. On October 9, 1997, he failed to appear before the Immigration Judge for an Individual Hearing on his applications for relief including asylum, withholding of removal pursuant to Article III of Convention against Torture.

The Immigration Judge entered an order of removal on his case in Absentia denying all forms of relief. Respondent's application for asylum and withholding of removal was not considered at a merits hearing and he was ordered removed in Absentia.

That this motion to reopen is based upon newly discovered evidence that was not available at and could not have been presented at the time of individual hearing of the respondent removal proceedings before Immigration Court. This evidence was previously unavailable and respondent could not have secured it any time prior to respondent's scheduled Individual Hearing which he failed to appear at. The affidavits from respondent's relatives indicated the current political climate in Albania, which as stated is unstable. As such, these affidavits from respondents relatives state new sets of facts which could not have been considered by the Immigration Judge and which establish credible fear of future persecution as a reasonable person under these circumstances would fear going back to Albania. His claim is based upon the current fear of persecution and the past persecution his family suffered at the hands of the socialist government under Fantos Nano, who was the prime minister during the socialist government in Albania due to his father's and other family members' opposition to the socialist government.

The new evidence that respondent seeks to present before the Immigration Judge establishes the fact that respondent is still a target of attack in Albania. The new evidence, more specifically, the affidavit attached herewith from Mr. Muharrem Kucanan, who is respondent's paternal uncle, clearly indicates the fact that the situation with respect to the political opposition has not changed in Albania despite a change in the government as the structure/ components of the government substantially remain

to be the same and make up of the government has not changed and that the political conditions in Albania are hostile to people associated with opposition politics, and more specifically people affiliated with the former democratic government. The country condition news and internet articles on Albania attached hereto also buttress the fact that suppression of freedom of press and human rights remain to be an ongoing problem in Albania. These recent reports indicate that arbitrary arrest and detention, police corruption and impunity and politicization of the media remain to be areas of problem in the area of human rights. These evidence could not have been available during the scheduled Individual hearing which the respondent was not able to attend and thus the Court did not get an opportunity to consider them. Respondent's relatives' affidavits attached hereto state the circumstances of his past persecution and the current situation in Albania. He stated in his affidavit that his family made a decision to leave Albania to avoid harm and persecution by the socialist government which at the time was persecuting people that were linked to the former democratic government. Their problems with the government were solely due to their political opinion. The fact that the government was attacking people associated with the former regime clearly indicates that the respondent's family's persecution on account of their opposing political opinion was also a basis for a prima-facie torture case. As indicated in respondent's own affidavit attached hereto, respondent's family members were threatened, persecuted and otherwise tortured by the members of

the Socialist party. The new information in the form of affidavits from respondent's relatives also establishes the fact that the political differences and ideologies between the socialist party and the Democratic party in Albania caused the persecution of respondent's family in Albania. The newly discovered evidence clearly supports respondent's asylum application in the United States. In light of the foregoing, the newly discovered evidence is material in proving respondent's past and well founded fear of future persecution in Albania because of their opposing political opinion, making respondent prima facie eligible for the relief he is seeking.

It would be totally inhumane to return respondent to Albania under these circumstances. Although his family's persecution in the past does not create a presumption of a well-founded fear of future persecution in light of the fact that the government has changed since then, the government cannot overcome respondent's well founded fear by a showing of significantly changed conditions in Albania as the key players from the socialist government constitute part of the current government. Moreover, respondent's family was threatened, persecuted and tortured and thus prima-facie eligible for relief under Convention against torture.

Moreover, respondent's motion is timely as it comes under the exceptions to the general time and numerical limitations on Motions to reopen due to the fact that respondent's asylum request is based on changed country conditions. ***See***, 8 C.F.R. §

**1003.2(c)(3)(ii), Matter of J-J- interim decision 3323 (BIA 1997).** Respondent initially did apply for political asylum within one year of entry into the United States, and currently his case demonstrates a change in country conditions which have would still make him prima facie eligible for the relief he is seeking from removal to Albania. Accordingly, the change in country conditions, which is evidenced by the documents attached hereto is the basis for his application for political asylum and relief under convention against torture.

## II. ARGUMENT

### A. THE COURT HAS THE JURISDICTION TO REOPEN ITS DECISION AND STAY THE VOLUNTARY DEPARTURE ORDER

The Court has the jurisdiction to reopen or reconsider a removal proceeding. **INA § 240 (c)(6) and 8 C.F.R. § 1003.23.** Motions to reopen or reconsider are highly discretionary. ***See, INS v. Doherty*, 112 S. Ct. 719 (1992).** A motion to reopen or reconsider will not be granted unless the Court is satisfied that the respondent is prima facie eligible for the relief sought.

Respondent's departure is imminent to Albania, a country where the exhibits provided prove he will be persecuted and tortured. He is requesting the honorable court to rescind the absentia order entered against the respondent in light of the foregoing. Consequently, it would be a violation of his right to due process if his case is not reopened to allow the Court to consider the merits of his claim of persecution.

### B. RESPONDENT IS ENTITLED TO A FULLY EVIDENTIARY HEARING BEFORE IMMIGRATION COURT AND IS DESERVING OF A FAVORABLE EXERCISE OF DISCRETION

Due process would be better served affording the respondent full evidentiary hearing by the Immigration Court.

As previously indicated, motions to reopen are highly discretionary. ***See, INS v. Doherty,*** **supra**. Respondent has no criminal record of any kind. This factor constitutes a positive equity that deserves full consideration.

## III. CONCLUSION

For all the foregoing reasons, respondent prays that his motion to reopen be granted including the relief he is seeking. In the alternative, respondent seeks for reopening of his removal hearing to Immigration Court for an evidentiary hearing. He further request that the Court immediately stay the outstanding removal order pending its consideration of this motion.

RESPECTFULLY SUBMITTED,
FREKHTMAN AND ASSOCIATES

/s/

Hiwot Michael, Esquire
60 Bay 26th Street
Brooklyn, NY 11214
(718) 331-7700
Counsel for Respondent

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 22nd day of June 2006 a copy of the foregoing Motion to reopen and the memorandum in support was forwarded by regular mail postage prepaid to:

Office of the Chief Counsel
Department of Homeland Security
55 East Monroe St., Suite 1700
Chicago, IL 60603-5701

/s/

Hiwot Michael, Esquire

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A73-428-513 - Chicago Date: May 7, 2002

In re: KUCANA, AGRON

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Helms, Lawrence

ON BEHALF OF SERVICE: Lynn K. Hollander,
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

/s/
FOR THE BOARD

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**CHICAGO, ILLINOIS**

| | | |
|---|---|---|
| File: A73-428-513 | Date: February 17, 1998 | |
| In the Matter of: | ) | |
| | ) | |
| Agron KUCANA, | ) | IN DEPORTATION |
| | ) | PROCEEDINGS |
| Respondent | ) | |

Charge: Section 241(a)(1)(B) of the Immigration and Nationality Act — remained longer than permitted.

Application: Motion to Reopen

ON BEHALF OF THE RESPONDENT:
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ON BEHALF OF THE SERVICE:
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Chicago, IL 60604

## DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Albania. On July 1, 1996 the Immigration and

Naturalization Service (Service) issued an Order to Show Cause (OSC) charging the respondent as deportable under section 241(a)(1)(B) of the Immigration and Nationality Act (Act) for remaining in the United States for a time longer than permitted.

At a master calendar hearing on October 15, 1996, the respondent, through counsel, admitted the facts as alleged in the OSC and conceded deportability as charged. Accordingly, the Court found that deportability had been established by clear, convincing, and unequivoval evidence. The respondent sought relief from deportation in the form of asylum and withholding of deportation.

The respondent's hearing was continued numerous times for various reasons. Ultimately, a hearing date was set for October 9, 1997 at 9:00 AM. The respondent's counsel arrived promptly but the respondent himself did not appear. At 9:45 AM the Court proceeded *in absentia* finding that the respondent had abandoned any and all claims for relief from deportation. Consequently, the respondent was ordered deported in his absence to Albania.

The respondent submitted this motion to reopen on October 15, 1997 arguing that although the respondent did not appear for this hearing, he has diligently and conscientiously pursued his asylum for 18 months, therefore, that he overslept for the October 9, 1997 hearing should be excused. The respondent submitted affidavits in support of his

motion providing that he works every day from 6:00 p.m. to 8:00 a.m.

A motion to reopen an *in absentia* deportation order may be granted upon a showing that the alien did not receive notice an accordance with section 242B(a)(2) of the Immigration and Naturalization Act (Act). *See* INA section 242(c)(3)(B). Notice is deemed to be sufficient when sent by certified mail to the respondent's counsel or last known address. Neither proof of receipt by the respondent nor personal service is required. *An re Grijalva*, Int. Dec. 3246, 11 (BIA 1995). The respondent has the burden to provide a current address for receiving mail in a regular and timely manner. *Id.* As the respondent does not deny notice and there is no reason in the record to doubt insufficient notice, the respondent is deemed to have received notice.

A motion to reopen an *in absentia* deportation order may also be granted upon a showing by the respondent that the failure to appear was due to "exceptional circumstances." *See* INA section 242B(c)(3)(A). The term "exceptional circumstances" refers to circumstances beyond the alien's control, such as a serious illness of the alien or a death of the alien's immediate family, but not including less compelling circumstances. *See* INA section 242B(f)(2); *see also An re Shaar*, Int. Dec. 3290 (BIA 1996).

Although perhaps sympathetic, the respondent's grounds for reopening - that he overslept - does not constitute "exceptional

circumstances" as contemplated by the Act. Indeed, oversleeping is not beyond one's control like death or a serious illness. Accordingly, on that basis the respondent's motion will be denied.

Accordingly, the following order will be entered:

ORDER: IT IS ORDERED that the respondent's motion to reopen be DENIED.

/s/
RENETTA SMITH
IMMIGRATION JUDGE

**U.S. DEPARTMENT OF JUSTICE**
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:
Agon Kucana
RESPONDENT/APPLICANT

Case No.: A 73-428-513
Docket: Chicago, Illinois
IN Deportation PROCEEDINGS

**ORDER OF THE IMMIGRATION JUDGE**

On October 9, 1997, at 9:00 (AM)/PM, pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's/applicant's request for relief from deportation/exclusion. However,

☐ the respondent/applicant was not present.
☒ the respondent's/applicant's representative was present; however, the respondent/applicant was not present.
☐ neither the respondent/applicant nor the respondent's/applicant's representative was present.

Therefore, as no good cause was given in regard to the failure to appear at the hearing concerning the request for relief, I find that the respondent/applicant has abandoned any and all claim(s) for relief from deportation/exclusion.

Wherefore, the issue of deportability/excludability having been resolved, it is **HEREBY ORDERED** for the reasons set forth in the Immigration and Naturalization Service charging document

☐ that the applicant be excluded and deported from the United States.
☒ that the respondent be deported from the United States to Albania.

Renatta Smith
Immigration Judge
Date: October 9, 1997

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BEST AVAILABLE COPY

# PETITIONER'S BRIEF

133

No. 08-911

Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States

AGRON KUCANA,
*Petitioner,*

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether 8 U.S.C. § 1252(a)(2)(B)(ii) strips jurisdiction from federal courts to review rulings on motions to reopen by the Board of Immigration Appeals.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 533 F.3d 534 (7th Cir. 2008), and is reprinted in the Appendix to the Petition at Pet. App. 1a-21a.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 2008. On that same date, pursuant to Seventh Circuit Rule 40(e), the Court of Appeals voted not to rehear *en banc* the issue presented. The petition for a writ of certiorari was timely filed on October 3, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B), provides:

**(B) Denials of discretionary relief**

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

Additional statutory provisions are set forth in an Appendix to this Brief ("Pet. Br. App.").

## STATEMENT OF THE CASE

1. In 1996, Congress amended the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, to streamline judicial review of the legal claims of immigrants. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Three aspects of IIRIRA are particularly relevant here.

First, Congress enacted 8 U.S.C. § 1252(a)(2)(B), which addresses courts' jurisdiction over "Denials of Discretionary Relief" and applies "[n]otwithstanding any other provision of law (statutory or nonstatutory)."[1] Section 1252(a)(2)(B) begins by setting forth a number of specific forms of immigration-related discretionary relief that the courts lack jurisdiction to review: those addressed in §§ 1182(h), 1182(i), 1229b, 1229c, and 1255 of Title 8. *See* 8 U.S.C. § 1252(a)(2)(B)(i) (stating that "no court

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[1] The phrase "(statutory or nonstatutory)" was added by amendment in 2005. *See* REAL ID Act § 105(a)(1)(A)(i).

shall have jurisdiction to review . . . any judgment regarding the granting of relief under" the specified sections). Each of these provisions is one in which Congress expressly addressed the scope of the Attorney General's authority, either by using the word "discretion" or by couching the statute in terms of how the Attorney General "may" act or decide.[2]

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[2] Sections 1182(h) and (i), both governing waiver of inadmissibility for aliens convicted of certain crimes, provide that "[t]he Attorney General *may*, in his *discretion*, waive," 8 U.S.C. § 1182(h) (emphasis added), and that "[t]he Attorney General *may*, in the *discretion of the Attorney General*, waive," *id.* § 1182(i)(1) (emphasis added). Section 1229b, governing cancellation of removal and adjustment of status, provides that "[t]he Attorney General *may* cancel removal," *id.* § 1229b(a) (emphasis added), and that "[t]he Attorney General *may* cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence," *id.* § 1229b(b) (emphasis added). Section 1229c, governing voluntary departure, provides that "[t]he Attorney General *may* permit an alien voluntarily to depart the United States," *id.* § 1229c(a)(1), (b)(1) (emphasis added), and that "[t]he Attorney General *may* by regulation limit eligibility for voluntary departure under this section," *id.* § 1229c(e) (emphasis added). Finally, section 1255, governing adjustment of status to permanent residency, provides that "[t]he status of an alien . . . *may* be adjusted by the Attorney General, in his *discretion*." *Id.* § 1255(a) (emphasis added); *see also id.* § 1255(h)(2)(B) ("the Attorney General *may* waive" (emphasis added)); *id.* § 1255(i)(1) ("[t]he Attorney General *may* accept such application" (emphasis added)); *id.* § 1255(i)(2), (j)(1), (j)(2), (*l*)(1) ("the Attorney General *may* adjust the status of the alien"; "in the sole *discretion* of the Attorney General" (emphasis added)); *id.* § 1255(*l*)(2) ("in the Attorney General's *discretion*" (emphasis added; footnote omitted)).

Section 1252(a)(2)(B) then goes on to state that "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security[3] the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title." 8 U.S.C. § 1252(a)(2)(B)(ii). Like the provisions set forth in § 1252(a)(2)(B)(i), section 1158 specifically gives the Attorney General leeway to act: section 1158(a) discusses when an alien may apply for asylum, and section 1158(b) specifies that the "Secretary of Homeland Security or the Attorney General *may* grant asylum." *Id.* § 1158(b) (emphasis added).

After this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), Congress amended the statute in 2005 to clarify the existence of an exception to § 1252(a)(2)(B). That exception is set forth in § 1252(a)(2)(D), which permits review of "constitutional claims or questions of law." *See* REAL ID Act § 106(a)(1)(A)(iii), 8 U.S.C. § 1252(a)(2)(D) ("Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon

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[3] The phrase "or the Secretary of Homeland Security" was added in 2005. *See* REAL ID Act § 101(e)(1).

a petition for review filed with an appropriate court of appeals in accordance with this section.").

Second, IIRIRA codified procedures concerning motions to reopen immigration proceedings. The reopening process is "a judicial creation," *Dada v. Mukasey*, 128 S. Ct. 2307, 2315 (2008), but in IIRIRA, Congress for the first time enacted a provision substantively addressing reopening motions before the agency. That provision, 8 U.S.C. § 1229a (Pet. Br. App. 1a-15a), sets forth various procedural requirements with which the movant must comply: "[a]n alien may file one motion to reopen," 8 U.S.C. § 1229a(c)(7)(A); the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material," *id.* § 1229a(c)(7)(B); and the motion shall be filed within 90 days of the date of entry of a final administrative order of removal, unless the alien meets certain requirements, *id.* § 1229a(c)(7)(C). Section 1229a does not allude to the discretion of the Attorney General except in § 1229a(c)(7)(C)(iv)(III), which provides that under certain circumstances the "Attorney General may, in the Attorney General's discretion, waive this time limitation" for filing a motion to reopen. Pet. Br. App. 14a.

Third, Congress enacted as part of IIRIRA various provisions related to appellate review of orders denying motions to reopen. For example, Congress provided that when a petitioner seeks judicial review of an order of removal, "any review sought of a motion to reopen or reconsider the order

shall be consolidated with the review of the order" itself. *See id.* § 1252(b)(6) (Pet. Br. App. 16a). In another section, Congress provided that in the event an order of removal issues after an alien fails to appear for a hearing on written notice, it may be rescinded only on a motion to reopen, and that ultimately appellate review is limited to an assessment of the validity of the notice provided to the alien, the reasons why the alien did not attend the proceeding, and whether or not the alien is removable. *See id.* § 1229a(b)(5)(D) (Pet. Br. App. 5a).

2. Agron Kucana is a native and citizen of Albania. AR 543.[4] He applied for political asylum on the basis of persecution on account of his political involvement in Albania, where he actively campaigned in the early 1990s against the government and for the Albanian Democratic Party. Mr. Kucana's efforts were aimed at promoting democratic governance and political pluralism. AR 550-60; AR 270-84. As a result of his activism, Mr. Kucana was often threatened, arrested, and beaten. AR 272, 274-76, 280, 552, 555-56, 558.

This persecution persisted even after the Albanian Democratic Party's victory in the March 1992 election. At that time, the Party splintered into factions, and members of the former Communist secret police held influence within the newly

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[4] Citations to "AR" refer to the administrative record that was before the Immigration Judge and the Board of Immigration Appeals.

empowered party. AR 276, 279. On one occasion, Mr. Kucana was held by the police for 20 hours and beaten for his political activity. AR 220, 558. On another occasion, he was seriously injured when his vehicle was forced off the road and down a mountainside. AR 275-76, 556. In addition, men came to Kucana's home looking for him in a threatening manner, which he reported to the police to no avail. AR 559. He was then fired from his job and removed from his post in the Democratic Party. AR 280-81, 559. Ultimately, the Democratic Party filed charges against him alleging that he was "agitating against the party." AR 281.

Mr. Kucana fled to Turkey after receiving a warrant for his arrest in Albania, AR 282, and entered the United States in July 1995 on a B1/B2 visitor visa, AR 282, 543. After the Department of Justice issued an order to show cause, Mr. Kucana applied for political asylum and withholding of removal with the Executive Office for Immigration Review. AR 543-87.

Mr. Kucana failed to appear for a hearing and was ordered deported *in absentia* by the Immigration Judge ("IJ") on October 9, 1997. JA 29-32; AR 268. Mr. Kucana's attorney submitted a timely motion to reopen, with supporting affidavits, explaining that Mr. Kucana had missed his hearing because he slept through his alarm and had arrived shortly after the IJ ordered him deported *in absentia*. JA 29-32; AR 240-48. The IJ denied the motion to reopen, and Mr. Kucana appealed to the Bureau of Immigration Appeals ("BIA"). JA 28, 29-32; AR 139-47, 234-38,

253-54. On May 7, 2002, the BIA affirmed and dismissed Mr. Kucana's appeal. JA 28; AR 135.

On June 26, 2006, Mr. Kucana filed a second motion to reopen with the IJ based on new evidence, changed country conditions, and the fact that he was now the beneficiary of an approved I-130 immediate relative petition filed by his mother. JA 16-27. Mr. Kucana contended that he would face serious political persecution if removed to Albania as a result of material changes in the political conditions there, which had deteriorated severely since his original asylum application was denied. JA 18, 22-26. His motion was supported by an affidavit from Professor Bernd Fischer, a professor of Balkan history who is chair of the Department of History at Indiana University Fort Wayne and a scholar on modern Albanian society and politics. AR 108-22. Professor Fischer described the political developments in Albania, explained why State Department reports discounting the danger to people like Mr. Kucana were both factually wrong and out of date, and concluded that "Agron Kucana has a reasonable and objective basis to fear future persecution" in Albania. AR 118-21.

The immigration judge denied this motion to reopen, JA 6-15, and on appeal the BIA held that the IJ lacked jurisdiction because successive motions to reopen must be filed directly with the BIA itself, Pet. App. 23a. Treating Mr. Kucana's papers as a new motion to reopen, the BIA denied reopening because it found that conditions in Albania had improved since 1997. *Id.* at 25a-26a. However, the BIA failed

to mention or discuss the expert affidavit of Professor Fischer in its decision.

Mr. Kucana petitioned for review of the BIA decision, arguing that that the Board erred by ignoring the material evidence he submitted in support of his motion. The parties briefed the matter and argued the case, but the Seventh Circuit subsequently ordered the submission of post-argument memoranda on whether the court lacked jurisdiction over the petition based on 8 U.S.C. § 1252(a)(2)(B)(ii), which states that "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security."

Although both Mr. Kucana and the Department of Justice argued that § 1252(a)(2)(B)(ii) does not cover decisions by the BIA not to reopen because the authority to reopen is not "specified" to be discretionary "under [the relevant] subchapter," the Seventh Circuit held that it lacked jurisdiction to hear the appeal. Pet. App. 10a (*Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008)). The court found that it was bound by a prior circuit decision, *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1870 (2008), which held that § 1252(a)(2)(B)(ii) applies to decisions that are specified to be discretionary by regulations that implement the Immigration and Nationality Act. Pet. App. 8a. The discretionary decision in *Ali* was

whether to grant an alien's request for a continuance of a hearing, but – with almost no discussion – the *Kucana* court extended that holding to the decision of whether to grant a motion to reopen, which is within the Attorney General's discretion pursuant to regulation. *Id.* at 4a-5a. The *Kucana* court did not identify anything in the statute that specified the Attorney General's discretion, but concluded that "§ 1252(a)(2)(B)(ii) applies when the agency's discretion is specified by a regulation rather than a statute." Pet. App. 4a.

One member of the panel concurred *dubitante* (Ripple, J.), *id.* at 12a, and one member of the panel dissented (Cudahy, J.), *id.* at 15a. Judge Ripple concurred only because he believed the panel to be bound by the holding in *Ali*, but noted that the court was "chart[ing] a course" that did not "closely adhere[ ] to the statutory language chosen and enacted by Congress." *Id.* at 15a. Judge Ripple concluded that "had Congress intended to deprive this court of jurisdiction of specific substantive decisions, it would have done so explicitly." *Id.* Similarly, in his dissent Judge Cudahy stated that the majority's decision gave "the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip us of our jurisdiction," in contravention of the "strong presumption that Congress intends judicial review of administrative action." *Id.* at 16a-18a (internal quotation marks omitted). He also noted that every other court to decide the question has held that

§ 1252(a)(2)(B)(ii) does not remove appellate jurisdiction over petitions to review orders denying reopening motions. *See id.*; *see also, e.g.*, *Singh v. Mukasey*, 536 F.3d 149, 153-54 (2d Cir. 2008); *Miah v. Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Jahjaga v. Att'y Gen.*, 512 F.3d 80, 82 (3d Cir. 2008); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1361 (11th Cir. 2006); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361-62 (10th Cir. 2004); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528-29 (9th Cir. 2004).

In addition, on the same day the panel opinion was issued, four members of the Seventh Circuit dissented from the Court's refusal to rehear *en banc* the issue presented. Pet. App. 20a (Ripple, Rovner, Wood, and Williams, JJ.); *see also* Seventh Cir. R. 40(e). These dissenters objected to the expansion of *Ali*, a decision about review of a procedural motion, into the "realm of outcome determinative decisions," which "takes us a long way from the statutory language chosen and enacted by Congress." Pet. App. 20a-21a. The dissenters resisted going "down a path so contrary to the manifest intent of Congress and to the Supreme Court's understanding of that intent." *Id.* at 21a.

## SUMMARY OF ARGUMENT

The plain text of 8 U.S.C. § 1252(a)(2)(B)(ii) does not strip the courts of appeals of jurisdiction except in a circumscribed category of immigration cases: those in which the petitioner seeks judicial review of decisions or actions "the authority for which is *specified under this subchapter* to be in the

discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The phrase "specified under this subchapter" is unambiguous. In selecting it, Congress made clear its intent to bar judicial review only where the Attorney General's authority to decide or act is expressly made discretionary by a provision in the relevant statutory subchapter, 8 U.S.C. §§ 1151-1381.

The BIA's denial of an alien's motion to reopen is not such a decision or action. The subchapter is silent as to the BIA's discretion to deny a motion to reopen, which is specified by regulation alone. Reopening thus stands in stark contrast to the other types of decisions or actions specifically identified in § 1252(a)(2)(B), all of which specify the Attorney General's discretion in the relevant statutory subchapter.

The Seventh Circuit's reading of the statute fails to satisfy the statutory requirement that authority be "specified under this subchapter to be in the discretion of the Attorney General." Thus, the statutory interpretation question presented in this case is not a close one – it can readily be resolved on the face of the statute itself. The authority to deny a motion to reopen is not "specified under" the relevant subchapter, and the courts of appeals therefore retain jurisdiction over petitions such as Mr. Kucana's.

Even if there were any ambiguity here (which there is not), the Seventh Circuit's reading would be untenable in light of three well-established

principles of statutory construction applied by this Court: first, the "'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,'" *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)); second, the requirement that a statute "be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (citation and internal quotation marks omitted); and third, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," *Dada*, 128 S. Ct. at 2318 (internal quotation marks omitted). Each of these principles counsels against deviating from the plain text of the statute to deprive the courts of jurisdiction over reopening decisions.

The Seventh Circuit's rule would also have extremely disruptive effects on the orderly administration of immigration law. Congress legislated the reopening process recognizing the need for such a process when country conditions change, new evidence is located after a hearing, or justice so requires for whatever reason. The Seventh Circuit's reading of the statute would make abuses of discretion in deciding these motions nonreviewable, notwithstanding the BIA's high rate of error in deciding them. Moreover, the Seventh Circuit's reading would make countless other discretionary decisions nonreviewable, and would invite the

executive to insulate many more administrative immigration decisions from review simply by making them "discretionary" through regulation. These consequences are directly contrary to what Congress contemplated and intended when it limited the reach of § 1252(a)(2)(B)(ii) to only those circumstances where the Attorney General's discretion is "specified under this subchapter."

## ARGUMENT

### I. By Its Plain Terms, § 1252(a)(2)(B)(ii) Does Not Apply To Decisions Denying Motions To Reopen.

#### A. The Unambiguous Text Of § 1252(a)(2)(B)(ii) Strips Courts Of Jurisdiction Only Where The Executive's Authority To Act Or Decide Is Specified To Be Discretionary By Statute.

Section 1252(a)(2)(B)(ii) eliminates the jurisdiction of the courts of appeals to review petitions seeking judicial review of decisions or actions "the authority for which is *specified under this subchapter* to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The meaning of "specified under this subchapter" is unambiguous. "[U]nder this subchapter" refers to particular provisions of the immigration statutes – those set forth in 8 U.S.C. §§ 1151-1381. "Specify" means "to name or state explicitly or in detail." *Webster's Third New International Dictionary* 2187 (1971); *see also Barnett Bank of Marion County, N.A. v. Nelson*, 517

U.S. 25, 38 (1996) ("'Specifically' can mean 'explicitly, particularly, [or] definitely,' . . . thereby contrasting a *specific* reference with an *implicit* reference made by more general language to a broader topic." (quoting *Black's Law Dictionary* 1398 (6th ed. 1990)); *Black's Law Dictionary* 1399 (6th ed. 1990) (defining "[s]pecify" as "to mention specifically; to state in full and explicit terms," or "to tell or state precisely").[5]

Because "specified" requires an explicit statement, the reach of § 1252(a)(2)(B)(ii) is limited to those instances where the statutory subchapter explicitly grants the Attorney General or the Director of Homeland Security discretionary authority to act.[6] Where such authority comes from any source other than the statutory subchapter, the resulting actions are outside the scope of the statute and therefore remain reviewable by the federal courts of appeals. The clear statutory text "forecloses" other interpretations. *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007); *see also Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009) ("[W]e must first determine whether the statutory text is plain

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[5] *See also generally, e.g., Limtiaco v. Camacho*, 549 U.S. 483, 488-89 (2007) (relying on *Black's Law Dictionary*); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) (relying on *Webster's Third New International Dictionary* (1976) and *Black's Law Dictionary* (6th ed. 1990)).

[6] Because the decision at issue in this case was a decision by the Attorney General, this brief sometimes refers for convenience to the Attorney General only when discussing the proper interpretation of the provision.

and unambiguous. If it is, we must apply the statute according to its terms." (citation omitted)).

This straightforward reading of § 1252(a)(2)(B)(ii) is confirmed by language elsewhere in § 1252(a)(2)(B) itself, which demonstrates that Congress carefully distinguished among the statutory subchapter, statutes other than those within the subchapter, and nonstatutory sources of law like regulations. *See Dada*, 128 S. Ct. at 2317 ("In reading a statute we must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'" (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). Section 1252(a)(2)(B) applies "[n]otwithstanding any other provision of law (statutory or nonstatutory)," a reference that demonstrates that Congress knows how to describe and give force to "nonstatutory" provisions like regulations if it so chooses. The contrast between Congress's identification of "statutory or nonstatutory" provisions in the introduction to § 1252(a)(2)(B) and its use of "specified under this subchapter" in § 1252(a)(2)(B)(ii) is telling. *See Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th rev. ed. 2000))); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) ("Further justification for our decision not to imply the private remedy . . . may be

found in the statutory scheme . . . . [W]hen Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.").

Also telling is Congress's use of the word "other" to link together § 1252(a)(2)(B)(i) and § 1252(a)(2)(B)(ii). Section 1252(a)(2)(B)(i), the subsection immediately preceding (a)(2)(B)(ii), enumerates specific forms of relief that courts lack the power to review; every statutory provision referenced explicitly mentions the scope of the Attorney General's authority. Section 1252(a)(2)(B)(ii)'s reference to "any *other* decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added), is plainly meant to be read consistently with § 1252(a)(2)(B)(i). That is, both § 1252(a)(2)(B)(i) and § 1252(a)(2)(B)(ii) limit the proscription on judicial review to situations in which Congress itself has specified the Attorney General's discretion. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) (explaining that "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows"); *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383 (2003) ("'Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature

to those objects enumerated by the preceding specific words.'" (citation omitted)).

The final clause of § 1252(a)(2)(B)(ii), which creates an exception to jurisdiction-stripping for review of "the granting of relief under section 1158(a) of this title," is fully consistent with this understanding of the provision. Without this exception, the granting of relief under section 1158 would fall within the scope of § 1252(a)(2)(B)(ii), because granting asylum is something for which the authority is specified under the subchapter to be in the Attorney General's discretion. *See* 8 U.S.C. § 1158(a), (b) (the "Secretary of Homeland Security or the Attorney General *may* grant asylum" (emphasis added)).[7] In carving out an exception for something that would otherwise be covered by the jurisdictional bar, Congress indicated the type of expressly discretionary decisions it intended to

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[7] While it is clear that Congress viewed the grant of discretion to provide § 1158(a) relief as within the scope of § 1252(a)(2)(B)(ii) (absent express language excepting it), that does not necessarily mean that every use of the term "may" sufficiently confers discretion within the meaning of § 1252(a)(2)(B)(ii). *See Zhu v. Gonzales*, 411 F.3d 292, 295-96 (D.C. Cir. 2005) (stating that "the term 'may' 'does not necessarily suggest unlimited discretion'" but that the "usual presumption" is that "'may' confers discretion" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001)). This Court need not decide for purposes of this case whether language such as "may" is sufficiently specific to bring a decision or action within the reach of § 1252(a)(2)(B)(ii), because the relevant subchapter does not specify that the BIA "may" grant or deny a motion to reopen, or use any other language that might conceivably be indicative of discretionary authority.

insulate from judicial review. *See, e.g.*, *Molzof v. United States*, 502 U.S. 301, 310-11 (1992) (examining specifically enumerated exceptions to statute in order to determine meaning and purpose of statute's general provisions).

The relevant subchapter details many such decisions, giving § 1252(a)(2)(B)(ii) plenty of independent work to do in the statutory scheme. Indeed, there are no fewer than thirty-four statutory provisions in that subchapter that expressly state that the Attorney General has "discretion" to act (and that are not listed in § 1252(a)(2)(B)(i)). *See Alaka v. Att'y Gen.*, 456 F.3d 88, 96-97 (3d Cir. 2006) (collecting examples). For instance, 8 U.S.C. § 1158(b)(2)(A)(v) provides that the Attorney General can determine "in [his] discretion that there are not reasonable grounds for regarding the aliens as a danger to the security of the United States." And 8 U.S.C. § 1227(a)(1)(E)(iii) provides that under certain circumstances the "Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of" a provision making deportable an alien who has encouraged or abetted another alien to illegally enter the United States. Section 1252(a)(2)(B)(ii) strips the federal courts of jurisdiction to review these decisions because the Attorney General's discretion to make them is "specified under" the relevant subchapter.

Thus, when read as a whole, § 1252(a)(2)(B) describes a reasonable and consistent scheme in which Congress maintained strict control over which

immigration decisions are unreviewable by the courts of appeals. In so structuring the statute, Congress declined to let the agency make determinations of when the Attorney General's authority to act is unreviewable, or to let courts guess as to when that might be so based on less than explicit statutory language. Such a state of affairs could lead to tremendous uncertainty, with constantly shifting and varying rules about what is reviewable. *Cf. Sosa*, 542 U.S. at 711-12 ("The idea that Congress would have intended any such jurisdictional variety is too implausible to drive the analysis . . . .").

Instead, in an "uncharacteristically pellucid" manner, *Zhao*, 404 F.3d at 303, Congress drew a line between those decisions and actions as to which the Attorney General's authority is specified to be discretionary under the subchapter, and those as to which it is not. When Congress wanted to specify that the Attorney General had unreviewable discretionary authority to take action or make a decision, it knew how to do so and did so clearly. And although Congress could readily have framed the jurisdiction-stripping provision as one that broadly covered (for instance) "any discretionary decision," it chose not to do so. *Compare* § 1252(a)(2)(B)(ii) *with* IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626 (enacting "transitional rules" applicable to certain cases pending when IIRIRA was passed and withdrawing judicial review over "any discretionary decision" made under specific provisions of the statute).

For all of these reasons, it is plain that § 1252(a)(2)(B)(ii) removes jurisdiction only for review of a decision that the Attorney General has discretionary authority to make by virtue of specific language in the relevant subchapter.

### B. The Denial Of A Motion To Reopen Is Not A Decision Or Action "Specified Under This Subchapter."

The authority of the Attorney General to deny a motion to reopen is not "specified . . . to be" discretionary in 8 U.S.C. §§ 1151-1381. Rather, the Attorney General's discretion to deny such a motion is conferred exclusively by regulation. *See* 8 C.F.R. § 1003.2(a) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board . . . . The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief."); *id.* § 1003.23(b)(3) (providing that an immigration judge has discretion to grant or deny a motion to reopen).

Congress first enacted statutory provisions governing agency determination of motions to reopen as part of IIRIRA in 1996. When it did so, Congress did not give the Attorney General discretionary authority to decide such motions, or even state that the Attorney General "may" decide them. Indeed, Congress did not address the Attorney General's authority to permit reopening at all.[8] Rather,

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[8] That is unsurprising given that, as this Court recently noted, "reopening is a judicial creation." *Dada*, 128 S. Ct. at 2315. The Attorney General (acting through the Board of

Congress elected only to set forth certain procedures that an alien must follow when filing a motion to reopen. Thus, 8 U.S.C. § 1229a (Pet. Br. App. 12a-15a) provides that "[a]n alien may file one motion to reopen," 8 U.S.C. § 1229a(c)(7)(A); that the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material," *id.* § 1229a(c)(7)(B); and that the motion shall be filed by a certain deadline, *id.* § 1229a(c)(7)(C). None of these provisions, by any stretch of the imagination, "specifie[s]" that a motion to reopen may be granted or denied "in the discretion of the Attorney General." *Id.* § 1252(a)(2)(B)(ii). Nor does any other provision of the subchapter in question expressly grant the Attorney General any discretionary authority that is relevant to Mr. Kucana's case.

Notably, however, there is one provision in § 1229a that grants the Attorney General discretionary authority to act with respect to a particular procedural aspect of a motion to reopen that is not at issue here. As to the statutory time limitation for filing a motion to reopen, § 1229a(c)(7)(C)(iv)(III) provides that under certain circumstances the "Attorney General may, in the Attorney General's discretion, waive this time limitation." Thus, Congress chose to grant the

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Immigration Appeals) granted and denied motions to reopen long before Congress first made mention of the procedure in a statute. *See id.*; *see also INS v. Doherty*, 502 U.S. 314, 322 (1992).

Attorney General "specifi[c]" discretion over this one aspect of motions to reopen. *See* § 1252(a)(2)(B)(ii). But Congress did not do so with respect to the ultimate decision to grant or deny such a motion (or any other decision regarding a motion to reopen). This distinction is a highly meaningful indicator of congressional intent. *See Nken*, 129 S. Ct. at 1759.

The Seventh Circuit nevertheless purported to find some discretionary authority over the denial of motions to reopen that was specified under the relevant subchapter. Although the court's reasoning is not especially clear, it concluded that "§ 1252(a)(2)(B)(ii) applies when the agency's discretion is specified by a regulation rather than a statute." Pet. App. 4a. The court seems to have reasoned that the reopening regulations are indirectly "specified" in the statute because the "regulations draw their force from provisions in the Act allowing immigration officials to govern their own proceedings." *Id.* at 5a (citing 8 U.S.C. § 1229a(c)(7)); *see also Ali*, 502 F.3d at 660-61, 663 (stating that "an immigration judge's denial of a continuance motion is a discretionary 'decision or action' the 'authority for which' is committed to the immigration judge by the relevant subchapter of the INA," which gives the agency "plenary authority to conduct removal proceedings," and concluding that the statutory authority "necessarily encompasses the discretion to continue the proceedings").

This reading of the statute elides the critical requirement that the authority in question be "specified under this subchapter to be in the

discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). There is nothing in the statute that purports to grant the Attorney General authority to deny a motion to reopen – certainly, the Seventh Circuit did not identify any such provision. And even if it were possible to find that the statutory provisions governing motions to reopen "specified" that the Attorney General has some general authority to make the ultimate decision on reopening, it is wholly impossible to find anything under the subchapter that specifies that the Attorney General's authority in this regard is discretionary. Implied authority or implied discretion is not sufficient. As then-Judge Alito explained:

> [W]e do not think . . . that the use of marginally ambiguous statutory language, without more, is adequate to "specif[y]" that a particular action is within the Attorney General's discretion for the purposes of § 1252(a)(2)(B)(ii). Of course, in a sense, an agency generally has "discretion" under *Chevron* to interpret ambiguous language used in a statute it administers. But if that sort of ubiquitous "discretion" were sufficient by itself to satisfy § 1252(a)(2)(B)(ii), the effects of that jurisdictional bar would be sweeping indeed. We

> do not believe that Congress intended such a result.

*Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 147-48 (3d Cir. 2004).

It may make sense for the Attorney General to have discretionary authority to deny motions to reopen, and the relevant regulations may be an eminently reasonable embodiment of this very rule. But those regulations are not a specification under the subchapter, and that is what the statute clearly and expressly requires.[10]

Because specification of discretionary authority in a regulation is insufficient to insulate a decision or action from appellate review under § 1252(a)(2)(B)(ii), § 1252(a)(2)(B)(ii) cannot be applied to deprive the courts of jurisdiction over Mr. Kucana's petition for review. Any argument that courts should be stripped of jurisdiction to review a denial of a motion to reopen like the one at issue here is an argument that is properly addressed to Congress, and not to this Court. "[U]nless and until Congress makes such a decision," this Court "must follow the current direction [§ 1252(a)(2)(B)(ii)] provides." *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998).

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[10] Of course, there is no difficulty in judicially reviewing a discretionary agency decision; such review simply takes place under the familiar abuse of discretion standard. *See Doherty*, 502 U.S. at 323 ("[T]he abuse-of-discretion standard applies to motions to reopen . . . .").

## II. Assuming *Arguendo* Any Ambiguity In The Statutory Text, All Relevant Principles Of Interpretation Weigh Heavily Against The Seventh Circuit's Reading Of The Statute.

Although the meaning of § 1252(a)(2)(B)(ii) is clear on its face, if there were any doubt about its proper interpretation (which there is not), that doubt would be erased by three different principles of statutory interpretation that are directly applicable here: the presumption favoring judicial review of administrative action; the basic rule that a statute should be interpreted to avoid rendering any of its provisions superfluous; and the immigration rule of lenity.[11]

### A. The Presumption Favoring Judicial Review Of Administrative Action Counsels Against The Seventh Circuit's Interpretation.

This Court has long recognized a "'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action.'" *Reno*, 509 U.S. at 63-64 (quoting *McNary*, 498 U.S. at 496). Pursuant to this presumption, this Court will "find an intent to preclude such review only if presented with 'clear and convincing evidence.'" *Id.* at 64; *see also McNary*, 498 U.S. at 496 (explaining

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[11] No other consideration points in the other direction. In this regard, it is notable that the legislative history of the relevant statutory provisions is quite sparse. *See* Division C of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 301(a), 110 Stat. 3009-546, 3009-575 (Sept. 30, 1996).

that "[i]t is presumable that Congress legislates with knowledge of" the presumption).

This canon counsels strongly against any interpretation of § 1252(a)(2)(B)(ii) that would sweep denials of motions to reopen within the scope of that jurisdiction-stripping provision. Indeed, the Seventh Circuit's reading of § 1252(a)(2)(B)(ii) would effectively insulate from judicial review virtually all discretionary immigration decisions – including many decisions outside the reopening context. *See infra* at pp. 37-39. There is no "clear and convincing evidence" that Congress intended that extraordinary result. In fact, there is no evidence whatever to that effect, and Congress made a clear statement to the contrary.

Accordingly, were there any question about the proper interpretation of § 1252(a)(2)(B)(ii), this canon alone would resolve it. As in many prior cases that have cited and relied on the canon, this Court should interpret the immigration statutes to preserve the jurisdiction of the federal courts. *See St. Cyr*, 533 U.S. at 298 (holding that AEDPA and IIRIRA did not deprive federal courts of jurisdiction to review alien's habeas petition); *Reno*, 509 U.S. at 63-64 (noting that INA provision cannot be interpreted to bar judicial review for certain plaintiffs); *McNary*, 498 U.S. at 496 (holding that INA provision does not preclude all judicial review); *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) (holding that, despite INA provision limiting judicial review of deportation orders, aliens prosecuted for illegal entry following deportation may assert the invalidity of the

underlying administrative deportation order in a constitutional proceeding).[12]

### B. The Rule That A Statutory Provision Should Not Be Construed To Render Other Provisions In The Statute Superfluous Counsels Against The Seventh Circuit's Interpretation.

In provisions enacted at the same time as § 1252(a)(2)(B)(ii), Congress expressly contemplated judicial review of denials of motions to reopen and indicated its intent for there to be such judicial review. Under the Seventh Circuit's interpretation of § 1252(a)(2)(B)(ii), these provisions would have been superfluous the moment they went into effect. This illogical result is "at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley*, 129 S. Ct. at 1560 (citation omitted); *see also, e.g., Stone v. INS*, 514

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[12] *See also, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 575-76 (2006) (declining to interpret the Detainee Treatment Act to preclude review by this Court); *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (declining to interpret statute to preclude judicial review of claim that Veterans Affairs regulation violated Rehabilitation Act); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (holding that Congress has not barred judicial review of regulations promulgated under Part B of Medicare program); *Johnson v. Robison*, 415 U.S. 361, 366 (1974) (declining to interpret a statute to preclude judicial review of a decision of the Administrator of Veterans Affairs and noting that the statute would otherwise raise constitutional concerns).

U.S. 386, 397 (1995); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *Moskal v. United States*, 498 U.S. 103, 109-110 (1990) (discussing "the established principle that a court should give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)).

One statutory provision that cannot be reconciled with the Seventh Circuit's interpretation of § 1252(a)(2)(B)(ii) is 8 U.S.C. § 1252(b)(6), which was passed in 1996 as part of IIRIRA and provides that when a petitioner seeks judicial review of an order of removal, "any review sought of a motion to reopen or reconsider the order [of removal] shall be consolidated with the review of the order" itself. *See* § 1252(b)(6). If Congress had not intended for the courts to have jurisdiction to review decisions denying motions to reopen, there would have been no need for a provision specifying that such review is to be consolidated on appeal with review of removal orders. *See, e.g.*, *Stone*, 514 U.S. at 397; *Infanzon*, 386 F.3d at 1361-62 (noting that the consolidation provision would be "unnecessary" if motions to reconsider were unreviewable).[13]

Another provision that expressly contemplates judicial review of denials of motions to reopen is 8 U.S.C. § 1229a(b)(5)(A), which was also enacted as part of IIRIRA in 1996. It addresses orders of

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[13] The regulations giving the Attorney General discretion to grant or deny a motion to reopen were in effect when this statutory provision became law, and have remained so ever since. *See* 61 Fed. Reg. 18,904 (1996).

removal issued *in absentia* if an alien fails to appear for hearing and the government proves that the alien is removable. Such an order can be rescinded "only . . . upon a motion to reopen" that is filed within certain time limits and that demonstrates that the failure to appear "was because of exceptional circumstances," or that "the alien did not receive notice" or "was in Federal or State custody." 8 U.S.C. § 1229a(b)(5)(C)(i)-(ii). The statute then expressly limits the substantive scope of review of those decisions, but does not deprive courts of jurisdiction to review them: "[a]ny petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall . . . be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." § 1229a(b)(5)(D)(i)-(iii).[14] If § 1252(a)(2)(B)(ii) made motions to reopen unreviewable, then § 1229a(b)(5)(D)'s careful delineation of the circumstances under which review is available for motions to reopen orders entered *in absentia* would have been meaningless when it was enacted. *See Stone*, 514 U.S. at 397.

The Seventh Circuit's opinion claims that its reading of § 1252(a)(2)(B)(ii) does not create any

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[14] Because a removal order entered *in absentia* may be challenged on appeal only after an alien has filed a motion to reopen and the BIA has denied it, *see id.* § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii), a petition for judicial review in this context necessarily challenges the denial of the motion to reopen.

superfluity, basing this argument on § 1252(a)(2)(D), the 2005 enactment providing that nothing in § 1252(a)(2)(B) that "limits or eliminates judicial review[ ] shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(2)(D). Pet. App. 8a-10a. According to the Seventh Circuit, § 1252(a)(2)(D) permits judicial review of legal and constitutional questions relating to discretionary decisions, so that any statutory provision contemplating judicial review of motions to reopen remains operative and serves a purpose, even if § 1252(a)(2)(B)(ii) bars review where § 1252(a)(2)(D) does not apply. Pet. App. 8a-10a. In other words, according to the Seventh Circuit, because denials of motions to reopen remain reviewable in certain limited circumstances, the consolidation and *in absentia* provisions described above are not superfluous.

This argument fails on several grounds. First, Congress's later enactment of § 1252(a)(2)(D) – nine years after the passage of IIRIRA – cannot alter the original meaning of the jurisdiction-stripping provision at issue in this case. The relevant question in interpreting § 1252(a)(2)(B)(ii) is Congress's intent at the time that the provision was enacted. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) ("We seek, therefore, indicia of congressional intent *at the time the statute was enacted*." (emphasis added)); *cf. Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (stating that "later enacted laws" do not

"declare the meaning of earlier law"). Moreover, § 1252(a)(2)(D) was plainly intended to *permit* judicial review, with no indication that it would eliminate review in other circumstances. The Seventh Circuit's reading of the safety-valve provision to restrict judicial review is perverse.

Second, the safety-valve provision of § 1252(a)(2)(D) does not in fact eliminate the superfluity problem that the Seventh Circuit's view creates. Congress provided that judicial review of a motion to reopen an order entered *in absentia* must take into account three factors, one of which is "the reasons for the alien's not attending the proceeding." 8 U.S.C. § 1229a(b)(5)(D)(i)-(iii). But that factor – which Congress expressly contemplated would be the subject of decisions by the courts of appeals – is primarily fact- and equity-based, and will virtually never give rise to a constitutional claim or a question of law. In this respect, § 1229a(b)(5)(D) remains superfluous under the Seventh Circuit's interpretation, even if § 1252(a)(2)(D) can somehow be interpreted to change the meaning of a jurisdiction-stripping provision enacted nine years earlier.

Petitioner's straightforward interpretation rationalizes all of these provisions rather than giving rise to inconsistencies among them. It is therefore Petitioner's interpretation, and not the Seventh Circuit's, that makes the subchapter as a whole

coherent and meaningful. That is the result that Congress clearly intended.[15]

### C. The Immigration Rule Of Lenity Counsels Against The Seventh Circuit's Interpretation.

Finally, there is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Dada*, 128 S. Ct. at 2318 (internal quotation marks omitted); *see also St. Cyr*, 533 U.S. at 320; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."). This rule is animated by the understanding that "the stakes are considerable for the individual" who seeks legal permission to remain in this country. *Errico*, 385 U.S. at 225. Accordingly, this Court has held that "we will not assume that Congress meant to trench

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[15] There is only one reading of the statute under which the provisions discussed above were not superfluous when enacted: a reading under which § 1252(a)(2)(B)(ii) permits appellate review of factual (and legal) errors and bars only *purely* discretionary decisions. *See, e.g., Spencer Enters., Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003) (holding that § 1252(a)(2)(B)(ii) bars only review of "matters of pure discretion, rather than discretion guided by legal standards"). *But see Suvorov v. Gonzales*, 441 F.3d 618, 622 (8th Cir. 2006) ("We lack jurisdiction to review questions of fact underlying discretionary decisions of the Attorney General."). But, in any event, Mr. Kucana prevails under this reading as well, because his petition for review alleges that the BIA decided the facts erroneously – a decision that is not a matter of pure discretion.

on [the alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* (internal quotation marks omitted); *see also Costello v. INS*, 376 U.S. 120, 128 (1964).

Construing any hypothetical ambiguity in favor of the alien means construing § 1252(a)(2)(B)(ii) to permit judicial review, which protects the alien's ability to justifiably seek reopening. Without such review, aliens may be subject to deportation even though the agency's decision to deny reopening is demonstrably erroneous.

## III. The Consequences Of The Seventh Circuit's Interpretation Of § 1252(a)(2)(B)(ii) Would Be Harmful.

### A. Appellate Review Of Motions To Reopen Immigration Decisions Is Essential To Prevent Injustice.

This Court has explained that motions to reopen are an "important safeguard" designed to "ensure a proper and lawful disposition" of an alien's case. *Dada*, 128 S. Ct. at 2318. It has analogized reopening motions to motions brought pursuant to Federal Rule of Civil Procedure 60(b), which provides for relief from a final judgment in situations involving mistake, fraud, newly discovered evidence, or similar circumstances. *See Stone*, 514 U.S. at 401. That kind of relief is particularly critical in cases where the outcome was the result of procedural default. *See Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (describing the "legitimate" function of Rule

60(b) motions "to relieve parties from the effect of a default judgment mistakenly entered against them").

The extremely high stakes in the immigration context significantly increase the importance of such a safeguard, and of appellate review to ensure that reopening is afforded to aliens in a fair and consistent manner. The consequences of a judgment in an immigration proceeding can be extraordinarily severe. *See Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile . . . ." (internal quotation marks omitted)); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not met the essential standards of fairness.").

It is against the backdrop of these consequences that the Seventh Circuit's interpretation of § 1252(a)(2)(B)(ii) must be viewed. That interpretation would bar review of decisions denying motions to reopen in a manner that would force petitioners to bear certain unjust consequences of immigration judgments. For example, a change in the political climate of a petitioner's home country may render a previous adverse judgment unjust, something Congress expressly recognizes in providing for reopening on this basis. *See* 8 U.S.C.

§ 1229a(c)(7). If the BIA abuses its discretion in denying such a motion, the Seventh Circuit's interpretation of § 1252(a)(2)(B)(ii) would nonetheless foreclose appellate review. The stakes in those situations are often life and death, which is precisely why Congress narrowly circumscribed that provision's limits on appellate review and why this Court construes statutes against limitations on judicial review and in favor of the alien. *See Dada*, 128 S. Ct. at 2318; *Reno*, 509 U.S. at 63-64.

The consequences of eliminating appellate review of immigration decisions are magnified given the high rate at which the courts of appeals reverse the BIA for abuse of discretion. *See Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005); *Zuh v. Mukasey*, 547 F.3d 504, 513-14 (4th Cir. 2008). The Seventh Circuit, in particular, has noted that in one recent year it reversed almost 40% of the BIA judgments that came before it. *Benslimane*, 430 F.3d at 829-30. Denials of motions to reopen or reconsider are among the most heavily criticized decisions. *See, e.g., Dawoud v. Gonzales*, 424 F.3d 608, 611 (7th Cir. 2005); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 155 (3d Cir. 2005); *Ssali v. Gonzales*, 424 F.3d 556, 563-64 (7th Cir. 2005). In reviewing those decisions, courts have uncovered problems as serious as an agency decisionmaker's complete lack of familiarity with the facts of the case and with its own precedent, *Ssali*, 424 F.3d at 563-64, and "extraordinarily abusive" treatment of petitioners, *Fiadjoe*, 411 F.3d at 154. Yet where the BIA's abuse of discretion does not give rise to a constitutional

claim or question of law, the Seventh Circuit's interpretation would entirely preclude appellate review.

In light of the pervasive problems with BIA adjudication, as well as the nature of the errors corrected by judicial review of denials of motions to reopen, this Court should be extremely reluctant to find that Congress intended to strip courts of jurisdiction over a substantial and important subset of immigration decisions.

### B. The Seventh Circuit's Interpretation Would Allow The Executive Branch To Insulate Its Decisions From Judicial Review.

The Seventh Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii) gives "the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip [courts] of [their] jurisdiction." Pet. App. 16a (Cudahy, J., dissenting). According to the Seventh Circuit's view, where there is even the slightest suggestion of an implicit authority to act under a statute, the Attorney General or Secretary of Homeland Security could avoid judicial review of issues of fact and equity simply by promulgating regulations that define a particular action as "discretionary." There is no indication that Congress intended to grant such broad authority to the executive branch to shield itself from judicial review. Indeed, it is "axiomatic" that federal agencies do not have the authority to determine federal court jurisdiction. *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir.

1999); *see also Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995).

The consequences of the Seventh Circuit's interpretation are unacceptably far-reaching. A large number of Attorney General actions are already classified as discretionary solely by regulation. For instance, pursuant to regulation an *in absentia* removal order "may be rescinded" on a showing that the alien did not receive proper notice, or was in state or federal custody at the time the order issued. *See* 8 C.F.R. § 1003.23(b)(4)(ii). Under the Seventh Circuit's view, even a clearly erroneous agency finding that an individual received notice, constituting an abuse of the agency's discretion, would be beyond the jurisdiction of the federal courts.

Moreover, the Seventh Circuit's interpretation gives the executive branch a strong incentive to attempt to escape judicial review by reclassifying other decisions and actions as discretionary. For instance, current regulations provide that an immigration attorney "shall be subject to disciplinary sanctions" if found to knowingly take actions that "lack an arguable basis in . . . fact." *Id.* § 1003.102(j)(1). Current regulations also provide that an immigration judge who determines that an asylum officer was wrong in finding the absence of a credible fear of persecution shall vacate the asylum officer's removal order. *See id.* § 1003.42. If the regulations were changed to make these decisions discretionary, the Seventh Circuit would deem them unreviewable, despite the gravity of the

consequences. This Court should not countenance that extraordinary result.

## CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Seventh Circuit, hold that the courts of appeals retain jurisdiction to review decisions of the BIA denying motions to reopen, and remand this case for further proceedings.

Respectfully submitted,

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# APPENDIX

**8 U.S.C. § 1229a**

§ 1229a. Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of

evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place–

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General–

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in

subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only–

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the

alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation–

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or (2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be

based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing–

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is–

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien–

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have

the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to

depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply–

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii)

of section 1154(a)(1)(B) of this title, section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means–

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

**8 U.S.C. § 1252**

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

* * * *

(2) Matters not subject to judicial review

* * * *

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

* * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * *

# RESPONDENT'S BRIEF

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SUPREME COURT, U.S.

No. 08-911

# In the Supreme Court of the United States

AGRON KUCANA, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether the court of appeals erred in holding that under 8 U.S.C. 1252(a)(2)(B)(ii) it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen his immigration proceedings.

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# In the Supreme Court of the United States

No. 08-911

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*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 533 F.3d 534. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 22a-26a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 7, 2008. The petition for a writ of certiorari was filed on October 3, 2008, and was granted on April 27, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-22a.

## STATEMENT

Petitioner is a native and citizen of Albania who was admitted to the United States as a visitor and has remained here well past the time allowed. Petitioner failed to appear for his removal hearing and was ordered removed in absentia. He filed a motion to reopen seeking to excuse his absence and rescind his removal order. That motion was denied. Four years later, petitioner filed a second motion to reopen his removal proceedings, this time contending that changed political conditions in Albania made him eligible for relief from removal. The Board of Immigration Appeals (Board) denied the motion on the ground that petitioner had failed to satisfy his heavy burden of justifying reopening. The court of appeals dismissed petitioner's challenge to that ruling, holding that it lacked jurisdiction to review the denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). It is the position of the government that the court of appeals erred in holding that it was without jurisdiction to review the Board's denial of the motion to reopen. Judicial review of such an order is not precluded, but the order is reviewable only for abuse of discretion.

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General and the Secretary of Homeland Security (Secretary). As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

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> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). Section 1158(a) concerns the discretionary granting of asylum. See 8 U.S.C. 1158(a). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.[1]

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[1] Section 1252, as enacted by IIRIRA and amended by the REAL ID Act, applies to petitioner's petition for review of the denial of his second motion to reopen. As originally enacted, IIRIRA provided that, in the case of an alien who was in deportation proceedings as of IIRIRA's effective date (April 1, 1997), the amendments made by IIRIRA shall not apply and "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." IIRIRA § 309(c)(1), 110 Stat. 3009-625. Judicial review of final orders of deportation in such cases thus was to be governed by former Section

b. If an alien fails to appear for his removal proceeding, he "shall be ordered removed in absentia" if the government establishes that he was provided with written notice of the proceeding and that he is removable. 8 U.S.C. 1229a(b)(5)(A). An alien who has been ordered removed in absentia may file a motion to reopen with the immigration judge (IJ) to rescind that order. 8 U.S.C. 1229a(b)(5)(C); 8 C.F.R. 1003.23(b)(4); see *In re Guzman*, 22 I. & N. Dec. 722, 723 (B.I.A. 1999) (Board lacks jurisdiction to review an in absentia removal order unless the alien first files a motion to reopen to rescind the order with the IJ).

To prevail on a motion to reopen to rescind an in absentia removal order, the alien must demonstrate either that he failed to receive adequate notice of his

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106 of the INA, 8 U.S.C. 1105a (1994), subject to certain transitional changes in Section 106 that were enacted in Section 309(c)(4) of IIRIRA, 110 Stat. 3009-626. Petitioner was in deportation proceedings prior to the effective date of IIRIRA, but he did not seek judicial review of the denial of his second motion to reopen until 2007. See p. 11, *infra*. In the REAL ID Act of 2005, Congress provided that all petitions for review filed after that Act's effective date would be governed by Section 1252, even if they were formerly governed by IIRIRA's transitional rules. See REAL ID Act § 106(d), 119 Stat. 311 ("A petition for review filed under former section 106(a) of the Immigration and Nationality Act * * * shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section," and "such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion."); see also, *e.g.*, *Onikoyi* v. *Gonzales*, 454 F.3d 1, 3 (1st Cir. 2006) ("[U]nder the REAL ID Act, transitional rules cases are now subject to the jurisdictional rules currently codified in 8 U.S.C. § 1252."). Because petitioner sought judicial review of the Board's denial of his second motion to reopen in 2007, his case is subject to amended Section 1252, which includes the jurisdictional bar at issue here, 8 U.S.C. 1252(a)(2)(B)(ii).

removal hearing or that "exceptional circumstances" justify reopening. 8 U.S.C. 1229a(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(iii)(A). "Exceptional circumstances" are limited to circumstances "such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances," that are "beyond the control of the alien." 8 U.S.C. 1229a(c)(1). If the motion to reopen is based on "exceptional circumstances," it must be filed within 180 days of the removal order. 8 U.S.C. 1229a(b)(5)(C)(i); 8 C.F.R. 1003.23(b)(4)(iii)(A)(*1*).[2]

c. The Act separately addresses motions to reopen removal proceedings for any reason other than to rescind an in absentia removal order. See 8 U.S.C. 1229a(c)(7). Such a motion is to be filed with the IJ or the Board, depending upon which was the last to render a decision in the matter. 8 C.F.R. 1003.2(c) (Board), 1003.23 (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). Where the motion to reopen is filed with the Board, it "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or pre-

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[2] Section 1229a(b)(5), discussed in the text, was enacted as part of IIRIRA. See IIRIRA § 304(a)(3), 110 Stat. 3009-590 to 3009-591. The INA contained a parallel provision prior to the enactment of IIRIRA. See 8 U.S.C. 1252b(c) (1994).

sented at the former hearing." 8 C.F.R. 1003.2(c)(1); see also 8 C.F.R. 1003.23(b)(3) (IJ).[3]

An alien may file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). Those limitations do not apply, however, if the motion to reopen alleges that asylum or withholding of removal is appropriate based on "changed country conditions arising in the country of nationality or in the country to which removal has been ordered" since the time of the removal order. 8 U.S.C. 1229a(c)(7)(C)(ii); see 8 C.F.R. 1003.2(c)(3)(ii), 1003.23(b)(4).[4]

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[3] IJs and the Board adjudicate motions to reopen pursuant to authority delegated by the Attorney General. See 8 U.S.C. 1103(g)(2); 8 C.F.R. 1003.1.

[4] This case was decided by the court of appeals on the premise that 8 U.S.C. 1229a(c)(7) applied to petitioner's second motion to reopen. See Pet. App. 5a. Petitioner did not challenge that premise in his certiorari petition, see Pet. 9 (relying on Section 1229a(c)(7)), and the government affirmatively proceeded on that premise in its brief in opposition, see Br. in Opp. 2-3, 12. It can be argued that Section 1229a(c)(7) did not apply to petitioner's second motion to reopen, because that provision was added in IIRIRA, see IIRIRA § 304(a)(3), 110 Stat. 3009-593 (enacting 8 U.S.C. 1229a(c)(6) (Supp. II 1996) (current version at 8 U.S.C. 1229a(c)(7)); petitioner was in deportation proceedings as of the effective date of IIRIRA; and IIRIRA provided that its new rules shall not apply to an alien who was in deportation proceedings on its effective date, IIRIRA § 309(c)(1), 110 Stat. 3009-625. See note 1, *supra*. At the same time, there is a reasonable argument that petitioner's second motion to reopen, which was filed in 2006, was covered by Section 1229a(c)(7), on the theory that the filing of a motion to reopen was not part of the same proceedings that culminated in the final order of deportation and therefore was subject to the amendments made by IIRIRA. See IIRIRA § 309(c)(1), 110 Stat. 3009-625 (provid-

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). That interest is especially strong in the immigration context, where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Accordingly, the movant must "meet[] a 'heavy burden' and present[] evidence of such a nature that the Board is satisfied that if proceedings before the immigration judge were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992); *Abudu*, 485 U.S. at 110. The Board has broad discretion in adju-

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ing that "the proceedings (including judicial review thereof) shall continue to be conducted without regard to [IIRIRA's] amendments").

If Section 1229a(c)(7) did not apply to petitioner's second motion to reopen, petitioner still would be subject to the procedural requirements discussed in the text, because they were contained in regulations that existed prior to IIRIRA. See 61 Fed. Reg. 18,900, 18,904-18,905 (1996) (8 C.F.R. 3.2(c) (1997) (current version at 8 C.F.R. 1003.2(c)); see also pp. 32-33, *infra*. But if Section 1229a(c)(7) was inapplicable, it would undermine the argument that Section 1252(a)(2)(B)(ii) precludes judicial review of the denial of petitioner's second motion to reopen, because the court of appeals relied on Section 1229a(c)(7) in concluding that the INA itself vests the Attorney General with discretionary authority to decide motions to reopen. See Pet. App. 5a.

Because the court below relied on Section 1229a(c)(7), because petitioner did not challenge the court's decision on that ground, because the government did not raise the issue in its brief in opposition, and because the issue is not one going to the jurisdiction of this Court, we suggest that the Court assume for purposes of its decision that Section 1229a(c)(7) does apply in this case. See Sup. Ct. R. 15.2.

dicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *Doherty*, 502 U.S. at 323; *Abudu*, 485 U.S. at 110; *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1985).

2. Petitioner is a native and citizen of Albania. Pet. App. 1a. He was admitted to the United States as a nonimmigrant visitor in July 1995 and remained in the United States beyond the time authorized. *Ibid.*; Administrative Record (A.R.) 607.

In May 1996, petitioner filed an application for asylum and withholding of removal with the former Immigration and Naturalization Service (INS),[5] contending that he would be persecuted if he was returned to Albania because he had been a member of the pro-democracy movement in the early 1990s. J.A. 7 n.2; A.R. 543-560. On June 26, 1996, the INS instituted proceedings charging petitioner with being removable as an alien who had overstayed his visa, A.R. 607, 609; see 8 U.S.C. 1251(a)(1)(B) (1994), and it referred his asylum application to an IJ, J.A. 7 n.2.

Petitioner appeared with counsel before the IJ. J.A. 7. He conceded that he was removable and renewed his request for asylum and withholding of removal. J.A. 7, 30. The IJ determined that petitioner was removable and scheduled a hearing to determine petitioner's eligibility for relief from removal. *Ibid.* Petitioner failed to appear for his removal hearing, and the IJ ordered him removed in absentia. Pet. App. 1a; J.A. 33; see 8 U.S.C. 1229a(b)(5).

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[5] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

3. Petitioner filed a motion to reopen his removal proceedings to rescind his in absentia removal order. Pet. App. 1a; see A.R. 259-262. He alleged that he had missed his hearing because he overslept. Pet. App. 1a-2a; A.R. 261.

The IJ denied petitioner's motion to reopen. J.A. 29-32; see Pet. App. 2a. The IJ explained that there was no allegation that petitioner had failed to receive adequate notice of the hearing. J.A. 31. The IJ also concluded that petitioner did not demonstrate that his failure to appear was due to "exceptional circumstances," meaning "circumstances beyond [his] control, such as serious illness of the alien or a death [in] the alien's immediate family." *Id.* at 31-32.

The Board affirmed the IJ's decision without an opinion. Pet. App. 2a; J.A. 28.

4. Over four years later, petitioner filed a second motion with the IJ to reopen his removal proceedings. Pet. App. 2a; J.A. 16-20. He argued that conditions in Albania had changed since the entry of his removal order and that his case should be reopened to allow him to apply for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel and Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. Pet. App. 2a; J.A. 16-18. Petitioner also contended that he was eligible for adjustment of status because his mother, a naturalized United States citizen, had filed a visa petition on his behalf, that petition had been approved, and the visa numbers had become current. Pet. App. 11a; J.A. 19.

The IJ denied the motion. J.A. 6-15. The IJ explained that petitioner had failed to present new evidence that warranted reopening his case, because condi-

tions had improved, rather than worsened, in Albania since the time he was ordered removed. J.A. 12-13. The IJ also determined that the approved visa petition did not justify reopening. J.A. 14-15.

5. The Board dismissed petitioner's appeal. Pet. App. 22a-26a. It first determined that the IJ lacked jurisdiction to consider petitioner's second motion to reopen because the Board "was last to render a decision in this matter." *Id.* at 23a; see 8 C.F.R. 1003.2(a). Treating the motion to reopen as if it had been filed with the Board initially, the Board concluded that petitioner had failed to demonstrate "prima facie eligibility for asylum or withholding of deportation * * * based on material changes that have occurred in Albania" since the time of his removal proceedings. Pet. App. 24a-26a.[6] The Board rejected petitioner's contention that he would be persecuted in Albania because he had been a vocal member of the Democratic Party, explaining that the Democratic Party "participates in the political system and holds seats in Parliament, and the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a-25a. The Board also observed that the Albanian Constitution "provides citizens with the right to change their government peacefully, and citizens exercised this right in practice"; that there were "no confirmed cases of people being killed or detained strictly for political reasons" and "no major outbreaks of political violence since 1998"; and that "neither the Government nor the major political parties engage in policies of abuse or coercion against their political opponents." *Id.* at 24a-25a & n.1.

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[6] On appeal to the Board, petitioner abandoned his argument that reopening was warranted so that he could pursue adjustment of status. Pet. App. 11a-12a, 25a; A.R. 12-19.

6. The court of appeals dismissed petitioner's petition for review. Pet. App. 1a-21a. The court observed that the Board's denial of reopening would be reviewed for abuse of discretion. *Id.* at 3a (citing 8 C.F.R. 1003.2(a)). The court then stated that, based on the record before it, "[i]t is difficult to perceive an abuse of discretion" here. *Ibid.* Petitioner's argument, the court explained, was that the Board erred in failing to explicitly address one affidavit included with his motion to reopen, but that affidavit "does not document a change in Albanian conditions since 1997; it is instead a historical narrative reaching back to the time when Albania was a totalitarian dictatorship." *Ibid.* The court also noted various ways in which conditions in Albania had improved: Albania had reached a "Stabilization and Association Agreement" with the European Union (EU) in 2006; Albanians have been able to travel throughout the EU since 2007; "Albania is today a democratic nation with international guarantees of human rights"; and "there have been no reported political killings or detentions for years." *Id.* at 2a-3a.

The court noted, however, that the parties' agreement that the abuse of discretion standard of review applied to the case caused it to wonder whether it should consider petitioner's contention at all. Pet. App. 3a. Having thus raised the issue, the court held that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to consider petitioner's challenge to the denial of his second motion to reopen. Pet. App. 3a-12a. As noted above, Section 1252(a)(2)(B)(ii) provides that no court shall have jurisdiction to review any action of the Attorney General "the authority for which is specified in [the relevant subchapter of the INA] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

The court acknowledged that a regulation, rather than the INA itself, confers on the Board the discretion to grant or deny a motion to reopen, but the court found this difference immaterial. In the court's view, Section 1252(a)(2)(B)(ii) "applies to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act," Pet. App. 4a-5a, and the regulation conferring discretion here "draw[s] [its] force from provisions in the [INA] allowing immigration officials to govern their own proceedings," *id.* at 5a (citing 8 U.S.C. 1229a(c)(7)).[7]

The court then noted that, although Section 1252(a)(2)(B)(ii) generally barred review of the denial of reopening, the court did have jurisdiction under 8 U.S.C. 1252(a)(2)(D) over constitutional claims or questions of law. Pet. App. 9a-10a. The court determined, however, that petitioner did not raise such a claim, because his "brief does not phrase his contentions in those terms" and his "entire argument is that the Board abused its discretion." *Ibid.*

Judge Ripple concurred but suggested that 8 U.S.C. 1252(a)(2)(B)(ii) should be limited to "procedural rulings." Pet. App. 12a-15a. Judge Cudahy dissented, *id.* at 15a-20a, contending that the court had jurisdiction because "there is no statutory language suggesting the level of deference to be afforded a denial of a motion to reopen," *id.* at 19a.

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[7] The court also rejected petitioner's argument that reopening was warranted based on his approved visa petition, explaining that petitioner had failed to present that claim to the Board. Pet. App. 11a-12a; see Pet. C.A. Supp. Br. 2 (petitioner's concession that he failed to exhaust that claim); see also 8 U.S.C. 1252(d)(1) (federal courts lack jurisdiction to consider a claim not presented to the Board).

7. In concluding that it lacked jurisdiction under Section 1252(a)(2)(B)(ii), the panel held that the Seventh Circuit's prior decision in *Singh* v. *Gonzales*, 404 F.3d 1024 (2005), which held to the contrary, must be overruled. Pet. App. 7a-10a. For that reason, the panel circulated its opinion to all active Seventh Circuit judges, pursuant to the Circuit's Rule 40(e). *Id.* at 10a. The panel's opinion noted that five judges voted in favor of rehearing en banc. *Ibid.*; see also *id.* at 20a-21a (opinion of Ripple, J., joined by Rovner, Wood, and Williams, JJ., dissenting from denial of rehearing en banc).

## SUMMARY OF ARGUMENT

The provision in the INA that limits judicial review of certain discretionary determinations, 8 U.S.C. 1252(a)(2)(B)(ii), does not apply to the Board's denial of motions to reopen.

A. By its plain text, Section 1252(a)(2)(B)(ii) applies only to decisions that the relevant subchapter specifies are within the discretion of the Attorney General or the Secretary of Homeland Security. Although motions to reopen are mentioned in the statutory subchapter, only a regulation, and not the statute itself, specifies that the Board has wide discretion in adjudicating them. If Congress had intended in Section 1252(a)(2)(B)(ii) to reach decisions for which discretionary authority is conferred by regulation, Congress easily could have said so. It did not, and denials of motions to reopen therefore are not reviewable under the unambiguous language of Section 1252(a)(2)(B)(ii).

B. The broader statutory context supports the view that Section 1252(a)(2)(B)(ii) does not preclude judicial review of denials of motions to reopen. In each of the several jurisdictional bars surrounding that provision,

Congress referred to and relied upon other statutes (as opposed to regulations) to constrict the scope of judicial review of removal orders, thereby evidencing its desire to retain control over the courts' review of such orders. Moreover, a separate provision of the INA's judicial review section confirms that denials of motions to reopen are judicially reviewable, because that section provides for consolidation of a petition for review challenging the denial of a motion to reopen with any separate petition challenging the denial of the underlying final order of removal.

C. The history of the immigration laws confirms that denials of motions to reopen are reviewable. Although aliens long have been permitted to file motions to reopen, Congress did not codify a provision permitting such filings until 1996. In the same legislation, Congress enacted Section 1252(a)(2)(B)(ii), yet made no suggestion that that provision applied to motions to reopen. Moreover, the federal courts long have reviewed denials of motions to reopen, and Congress did not indicate any intention to change that practice when it enacted Section 1252(a)(2)(B)(ii).

The court of appeals therefore erred in holding that it lacked jurisdiction over petitions for review of denials of motions to reopen under Section 1252(a)(2)(B)(ii). The court of appeals also observed that, even if it had jurisdiction, it would be difficult to conclude that the Board abused its discretion in denying petitioner's second motion to reopen. Although that conclusion is correct, this Court need not consider the fact-bound question whether the Board abused its discretion. The case therefore should be remanded to the court of appeals for further proceedings.

## ARGUMENT

### SECTION 1252(a)(2)(B)(ii) DOES NOT BAR JUDICIAL REVIEW OF THE BOARD'S DENIAL OF A MOTION TO REOPEN

The INA includes several provisions that limit judicial review of certain decisions of the Attorney General and the Secretary of Homeland Security in immigration proceedings. This case concerns 8 U.S.C. 1252(a)(2)(B)(ii), which provides that "no court shall have jurisdiction to review" any decision or action of the Attorney General or the Secretary of Homeland Security, "the authority for which is specified under this subchapter to be in the [relevant official's] discretion." The question in this case is whether the denial of a motion to reopen is such a decision or action. The answer is no, because a regulation, rather than a provision in the relevant subchapter of the INA, specifies that the Board has discretion to decide such a motion.

#### A. The Text Of Section 1252(a)(2)(B)(ii) Does Not Bar Judicial Review Of Denials Of Motions To Reopen

"As in any case of statutory construction, [this Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). Section 1252(a)(2)(B)(ii), by its plain terms, does not preclude judicial review of denials of motions to reopen.

1. At issue here is 8 U.S.C. 1252(a)(2)(B)(ii), which provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as

> provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review * * * any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii).

By its terms, the statutory text precludes judicial review of certain discretionary decisions rendered by the Attorney General or the Secretary of Homeland Security. The jurisdictional bar applies to "any" decision or action statutorily specified to be within the Attorney General's or the Secretary's discretion, regardless of whether the decision was made or action was taken in removal proceedings. See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008) ("any" has an "expansive meaning" (internal quotation marks omitted)). And the bar applies without regard to any other provision addressing judicial review, with the sole exception of 8 U.S.C. 1252(a)(2)(D), a provision under which Congress restored jurisdiction for constitutional and legal claims.

But the jurisdictional limitation in Section 1252(a)(2)(B)(ii) does not apply to every decision—or even every discretionary decision—made by the Attorney General or the Secretary. It applies only to those the "authority" for which is "specified under this subchapter to be in the [relevant official's] discretion." 8 U.S.C. 1252(a)(2)(B)(ii). The requirement that Congress have "specified" that the Attorney General or the

Secretary has discretionary authority over the decision means that the Act itself must contain language that renders the decision discretionary. *Webster's Third New International Dictionary of the English Language* 2187 (1993) ("specify" is "to mention or name in a specific or explicit manner: tell or state precisely or in detail"). And indeed, that statement must appear in a certain part of the Act—Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151 through 1381. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999). Finally, there is one kind of decision identified in Section 1252(a)(2)(B)(ii) for which judicial review is permitted—"the granting of [asylum] relief under section 1158(a)." 8 U.S.C. 1252(a)(2)(B)(ii).[8] The class of decisions reached by Section 1252(a)(2)(B)(ii), then, "is both very clear and limited." *Singh* v. *Mukasey*, 536 F.3d 149, 153 (2d Cir. 2008).

2. In this case, petitioner seeks judicial review of the Board's denial of his second motion to reopen. The denial of a motion to reopen is a "decision * * * of the Attorney General," because the Board acted on behalf of the Attorney General in adjudicating the motion. See 8 U.S.C. 1103(g)(2); 8 C.F.R. 1003.1. The critical question is whether the "authority" to grant or deny a motion to reopen is specified to be in the Attorney General's discretion under a provision in 8 U.S.C. 1151-1381.[9]

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[8] The decision at issue in this case does not concern "the granting of relief under section 1158(a)," because the Board did not decide whether to grant petitioner asylum in the exercise of its discretion. Instead, the Board considered only whether petitioner demonstrated changed country conditions establishing prima facie eligibility for asylum, withholding of removal, or CAT protection.

[9] Petitioner limited the question presented in this case to the scope of 8 U.S.C. 1252(a)(2)(B)(ii) and whether it "removes jurisdiction from

The Board's authority to act on a motion to reopen is set forth in a longstanding regulation—8 C.F.R. 1003.2(a)—not in a provision in the relevant statutory subchapter. The regulation provides that "[t]he Board may at any time reopen * * * any case in which it has rendered a decision" and that the Board's "decision to grant or deny a motion to reopen * * * is within the discretion of the Board," such that the Board may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." *Ibid.*; see also 8 C.F.R. 1003.23(b)(3) (IJ's discretion to decide a motion to reopen). In light of this regulation governing reopening, it is well-settled that whether to grant a motion to reopen is entrusted to the Board's discretion. See, *e.g.*, *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143 n.5 (1981) (per curiam).

By virtue of the enactment of IIRIRA in 1996, the relevant subchapter of the INA now also mentions motions to reopen—in 8 U.S.C. 1229a(c)(7). But that provision addresses only the procedures for filing such a motion; it is silent with respect to the authority of the Attorney General, through the Board or an IJ, to rule on such a motion, and thus does not speak to whether that

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federal courts to review rulings on motions to reopen by the Board of Immigration Appeals." Pet. 1. Petitioner did not seek review of the court of appeals' further ruling that 8 U.S.C. 1252(a)(2)(D), which restored jurisdiction in the courts to review "constitutional claims or questions of law" in petitions for review, was inapplicable in this case because petitioner did not raise any such claim or question in the court of appeals. See Pet. App. 10a. Indeed, petitioner did not cite Section 1252(a)(2)(D) in his certiorari petition or his reply brief at the petition stage. Although the government cited Section 1252(a)(2)(D) in the question presented in its brief in opposition, it likewise did not address the issue in the body of that brief. Accordingly, no question concerning the scope of Section 1252(a)(2)(D) is before the Court.

authority is discretionary in nature. Section 1229a(c)(7) provides that "[a]n alien may file one motion to reopen," 8 U.S.C. 1229a(c)(7)(A); specifies that the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material," 8 U.S.C. 1229a(c)(7)(B); and provides a deadline for the filing of such a motion, along with an exception to that deadline for certain cases in which the alien seeks asylum or withholding of removal, 8 U.S.C. 1229a(c)(7)(C).[10] Section 1229a(c)(7)(C) also provides special procedural rules for motions to reopen filed by battered spouses, children, and parents. See 8 U.S.C. 1229a(c)(7)(C)(iv).

Thus, while Section 1229a(c)(7)(C) obviously contemplates that the Attorney General, through the Board and the IJs, will rule on motions to reopen, it does not actually address the Attorney General's authority to do so or the manner in which that authority is to be exercised. Since the enactment of IIRIRA, as before, those matters are instead governed by regulations of the Attorney General that confer discretionary authority on the Board and the IJs. The omission of any such conferral of authority in the INA itself is especially glaring because there are "myriad Congressionally-defined, discretionary *statutory* powers of the Attorney General articulated within" the relevant subchapter. *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1361 (11th Cir. 2006). Indeed, there are over thirty provisions in the relevant subchapter of the INA that explicitly grant the Attorney General or the Secretary "discretion" to make

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[10] These requirements are also contained and supplemented in the relevant regulations. See 8 C.F.R. 1003.2(a) and (c)-(g), 1003.23(b).

a certain decision.[11] And, as the courts of appeals have recognized, several more provisions commit decisions to the Attorney General's or the Secretary's discretion using words that are functionally equivalent to "discretion."[12] By contrast, Section 1229a(c)(7) does not contain *any* language stating or even suggesting that the Attorney General has discretionary authority to decide motions to reopen. Section 1229a(c)(7) therefore does not "specif[y]" that motions to reopen may be granted "in the discretion of the Attorney General"—a necessary condition to trigger the jurisdictional bar in Section 1252(a)(2)(B)(ii).

The only discretionary authority expressly referred to in Section 1229a(c)(7)'s authorization of motions to reopen involves the Attorney General's ability to waive the filing deadline for motions to reopen for certain

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[11] See, *e.g.*, 8 U.S.C. 1157(c)(1); 8 U.S.C. 1159(b); 8 U.S.C. 1181(b); 8 U.S.C. 1182(a)(3)(D)(iv); 8 U.S.C. 1182(a)(9)(B)(v); 8 U.S.C. 1182(d)(1); 8 U.S.C. 1182(d)(3)(A); 8 U.S.C. 1182(d)(5)(A); 8 U.S.C. 1182(d)(11); 8 U.S.C. 1182(d)(12); 8 U.S.C. 1182(g)(1); 8 U.S.C. 1182(g)(3); 8 U.S.C. 1183; 8 U.S.C. 1184(c)(6)(F); 8 U.S.C. 1184(d)(1); 8 U.S.C. 1186a(c)(4); 8 U.S.C. 1186a(d)(3); 8 U.S.C. 1203(b); 8 U.S.C. 1225(a)(4); 8 U.S.C. 1225(b)(1)(A)(iii)(I); 8 U.S.C. 1227(a)(1)(E)(iii); 8 U.S.C. 1227(a)(1)(H); 8 U.S.C. 1227(a)(7)(B); 8 U.S.C. 1259; 8 U.S.C. 1281(a); 8 U.S.C. 1281(c); 8 U.S.C. 1286; 8 U.S.C. 1302(c); 8 U.S.C. 1305(b); 8 U.S.C. 1321(a); 8 U.S.C. 1330(a); 8 U.S.C. 1353.

[12] See, *e.g.*, *Zhu* v. *Gonzales*, 411 F.3d 292, 294-295 (D.C. Cir. 2005) (decision whether to grant national interest waiver under 8 U.S.C. 1153(b)(2)(B)(i) so alien may obtain a work visa); *Jean* v. *Gonzales*, 452 F.3d 392, 396 (5th Cir. 2006) (decision whether to grant waiver under 8 U.S.C. 1159(c) so alien may obtain adjustment of status); *Blake* v. *Carbone*, 489 F.3d 88, 98 n.7 (2d Cir. 2007) (decision whether to grant waiver of inadmissibility under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996)); *CDI Info. Servs., Inc.* v. *Reno*, 278 F.3d 616, 619 (6th Cir. 2002) (decision whether to grant visa extension under 8 U.S.C. 1184(a)(1)).

battered spouses, children, and parents if such a person "demonstrates extraordinary circumstances or extreme hardship to [his or her] child." 8 U.S.C. 1229a(c)(7)(C)(iv)(III). By its terms, that grant of discretionary authority is limited to the waiver of the statutory filing deadline; it does not address the scope of the Attorney General's authority with respect to the merits of such a motion.

The judicial review provision of the INA also mentions motions to reopen, providing for consolidating judicial review of motions to reopen with review of underlying removal orders. See 8 U.S.C. 1252(b)(6). But that provision likewise does not address the scope of the Attorney General's authority to grant or deny such a motion, and indeed it contemplates that judicial review of the denial of a motion to reopen is available, rather than barred by Section 1252(a)(2)(B)(ii). See pp. 30-31, *infra*.[13] There is, therefore, "nothing in the subchapter specifying that motions to reopen are 'in the discretion of the Attorney General.'" *Singh*, 536 F.3d at 154.

That conclusion is confirmed by a consideration of the consequence of the fact that the conferral of discretionary authority on the Board is set forth only in the Attorney General's regulation. Suppose that, instead of promulgating a regulation specifying that the Board has discretion to deny a motion to reopen, see 8 C.F.R. 1003.2(a), the Attorney General promulgated a regula-

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[13] There is also a provision—separate from Section 1229a(c)(7), which governs motions to reopen generally—that governs the special situation of a motion to reopen to rescind an in absentia removal order. See 8 U.S.C. 1229a(b)(5)(C). That provision likewise does not address the scope of the Attorney General's authority to rule on such a motion, and, in any event, it does not apply in this case, because petitioner does not challenge the denial of his first motion to reopen.

tion stating that, if certain criteria are met, the Board "shall grant a motion to reopen." The result of such a regulation would be that the Board no longer had discretionary authority to decide motions to reopen; instead, the Board would be required to grant motions to reopen under certain circumstances. There is no question that the Attorney General would have the authority to issue such a regulation, see 8 U.S.C. 1103(g), and such a regulation would be a permissible interpretation of the INA because the INA does not specify any standards for granting a motion to reopen. The fact that the Attorney General could revise his regulations to make granting motions to reopen mandatory under certain circumstances makes plain that the INA itself does not specify that the authority to decide such motions is in the Attorney General's discretion.[14]

3. Because nothing in the relevant subchapter of the INA specifies that the Attorney General has discretionary authority to adjudicate motions to reopen, Section 1252(a)(2)(B)(ii) does not bar review of the denial of such a motion. The only provision of law that contains the requisite specification is a regulation, 8 C.F.R. 1003.2. But the text of Section 1252(a)(2)(B)(ii) says nothing about the conferral of discretion by regulation, and Congress's express requirement that discretionary authority be "specified" in "this subchapter" makes clear that

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[14] Where the INA itself does specify that a particular decision is within the discretion of the Attorney General, a regulation directing the Board to grant or deny relief in specified circumstances would not remove the Board's decision from the scope of the jurisdictional bar in Section 1252(a)(2)(B)(ii). As far as the INA is concerned, the decision would remain discretionary with the Attorney General, and such a regulation would be an implementation of that discretion by instructing the Board how to exercise the discretionary authority on his behalf.

a conferral of discretion in a regulation does not qualify. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face"). That is especially true because, as a "jurisdictional statute," Section 1252(a)(2)(B)(ii) "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968).

Not surprisingly, all of the courts of appeals that have considered the question—with the exception of the court below—have agreed that the plain language of Section 1252(a)(2)(B)(ii) does not preclude them from reviewing a denial of a motion to reopen. See, *e.g.*, *Singh*, 536 F.3d at 153-154; *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Jahjaga* v. *Attorney Gen. of the United States*, 512 F.3d 80, 82 (3d Cir. 2008); *Zhao* v. *Gonzales*, 404 F.3d 295, 302-303 (5th Cir. 2005); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528-529 (9th Cir. 2004). And even the Seventh Circuit—in an opinion that was overruled in the decision below—previously had "conclude[d] that [it] ha[s] jurisdiction to review the Board's denial of [an alien's] motion to reopen" despite Section 1252(a)(2)(B)(ii). *Singh* v. *Gonzales*, 404 F.3d 1024, 1026-1027 (2005), overruled by *Kucana* v. *Mukasey*, 533 F.3d 534, 537-538 (2008) (Pet. App. 7a-10a), cert. granted, No. 08-911 (Apr. 27, 2009).[15]

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[15] Although Section 1252(a)(2)(B)(ii) does not preclude judicial review of denials of motions to reopen, there are certain circumstances in which such decisions would not be reviewable. If, for example, a court of appeals lacked jurisdiction to review the denial of the alien's underlying claim for relief, then it would also lack jurisdiction to review the denial of a motion to reopen that sought to revisit the denial of the

4. In the decision below, the court of appeals held that it lacked jurisdiction to review the denial of petitioner's motion to reopen because Section 1252(a)(2)(B)(ii) "applies to discretionary decisions under regulations that are based on and implement the Immigration and Nationality Act." Pet. App. 4a. The court of appeals acknowledged that a regulation—not a statute—"specifi[es]" that the Board has discretion to grant or deny a motion to reopen, but the court pointed out that the regulation "draw[s] [its] force from [a] provision in the [INA] allowing immigration officials to govern their own proceedings"—namely, 8 U.S.C. 1229a(c)(7), which provides for the filing of motions to

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underlying claim, because a contrary rule would permit an end-run around an applicable jurisdictional bar. That principle has been applied to determinations that are made unreviewable under 8 U.S.C. 1252(a)(2)(B)(i), see, *e.g.*, *Martinez-Maldonado* v. *Gonzales*, 437 F.3d 679, 683 (7th Cir. 2006) (hardship waiver under 8 U.S.C. 1229b); *Marinuta* v. *Gonzales*, 411 F.3d 361, 365 (2d Cir. 2005) (adjustment of status under 8 U.S.C. 1255); determinations that are entrusted to the Attorney General's discretion by statute and are unreviewable under 8 U.S.C. 1252(a)(2)(B)(ii), see, *e.g.*, *Assaad* v. *Ashcroft*, 378 F.3d 471, 473-474 (5th Cir. 2004) (waiver of removability based on good-faith marriage under 8 U.S.C. 1186a(c)(4)(B)); and determinations that an alien is removable because he committed a certain crime, which are unreviewable under 8 U.S.C. 1252(a)(2)(C), see, *e.g.*, *Cruz* v. *Attorney Gen. of the United States*, 452 F.3d 240, 246 (3d Cir. 2006); *Dave* v. *Ashcroft*, 363 F.3d 649, 652 (7th Cir. 2004); *Patel* v. *United States Att'y Gen.*, 334 F.3d 1259, 1261-1262 (11th Cir. 2003).

The courts of appeals also would be precluded from reviewing the denial of a motion to reopen when an alien seeks *sua sponte* reopening from the Board. The unanimous view of the courts of appeals is that such a claim is unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. 701(a)(2), and there are no judicially manageable standards for reviewing such a decision, see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003-1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals).

reopen. Pet. App. 5a. Because the Board's authority to adjudicate motions to reopen derives from the relevant subchapter of the INA, the court continued, Section 1252(a)(2)(B)(ii) applies to motions to reopen. *Ibid.*

The court of appeals is mistaken. In Section 1252(a)(2)(B)(ii), Congress required more than that the Attorney General's discretionary authority for making the decision at issue ultimately derives from a provision in the relevant statutory subchapter. Congress provided instead that the discretionary authority must be "*specified* under this subchapter." 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added). Although 8 U.S.C. 1229a(c)(7) obviously assumes that the Attorney General has the authority to adjudicate motions to reopen, the provision does not address that authority or the manner in which it is exercised. As the Fifth Circuit has explained: "The statutory language is uncharacteristically pellucid on this score: it does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is *specified under this subchapter* to be in the discretion of the Attorney General.'" *Zhao*, 404 F.3d at 303 (quoting 8 U.S.C. 1252(a)(2)(B)(ii)).

In deciding that Section 1252(a)(2)(B)(ii) applies to motions to reopen, the court of appeals overruled its prior decision in *Singh* v. *Gonzales*. Pet. App. 7a-10a. In *Singh*, the court observed that the statute "only describes the contents of motions to reopen and the filing deadlines" and does not contain "any specific language entrusting the decision on a motion to reopen to 'the discretion of the Attorney General.'" 404 F.3d at 1026-1027 (quoting 8 U.S.C. 1252(a)(2)(B)(ii)). That reasoning was correct, and there was no reason to revisit it. The court of appeals suggested that what it termed the

"narrow reading" of Section 1252(a)(2)(B)(ii) in *Singh* was no longer required in light of the REAL ID Act's allowance of jurisdiction to review "constitutional claims" and "questions of law," which ensured the availability of judicial review in some circumstances even if Section 1252(a)(2)(B)(ii) generally barred review. Pet. App. 8a-10a (quoting 8 U.S.C. 1252(a)(2)(D)). But the addition of Section 1252(a)(2)(D) in 2005 did not change the operative language of Section 1252(a)(2)(B)(ii) as enacted in 1996, and it therefore provides no basis for ignoring the plain meaning of that language. See *Jahjaga*, 512 F.3d at 82 ("The operative phrase here is 'specified under this subchapter.'"). The court of appeals therefore erred in applying Section 1252(a)(2)(B)(ii) to motions to reopen.

### B. The Statutory Context Confirms That Section 1252(a)(2)(B)(ii) Does Not Apply To Denials of Motions To Reopen

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (internal quotation marks omitted). Here, the context of the jurisdictional bar at issue confirms that it does not apply to decisions entrusted to the Attorney General's discretion by regulation, such as motions to reopen.

1. The provision at issue appears in Section 1252, the part of the INA that provides a complete set of procedures and standards for judicial review. Section 1252(a)(2), titled "Matters not subject to judicial review," lists a variety of agency determinations that are not reviewable by the federal courts. Those determina-

tions are broken into three categories: immigration officers' determinations of whether aliens applying for admission are admissible, 8 U.S.C. 1252(a)(2)(A); denials of discretionary relief, 8 U.S.C. 1252(a)(2)(B)(i) and (ii); and final orders of removal entered against criminal aliens, 8 U.S.C. 1252(a)(2)(C). The statute then provides that, notwithstanding the jurisdictional bars listed in Sections 1252(a)(2)(A)-(C), a court of appeals may still review "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

This statutory context underscores that Section 1252(a)(2)(B)(ii) does not apply to decisions in which a regulation (rather than a statute) provides the Attorney General with discretionary authority to make the decision. First, within Section 1252(a)(2)(B), clause (ii), at issue here, is immediately preceded by clause (i), which provides that the federal courts do not have jurisdiction to review "any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255." Each of the sections referenced addresses a different form of discretionary relief from removal: waivers of inadmissibility based on certain criminal offenses, 8 U.S.C. 1182(h); waivers of inadmissibility based on fraud or misrepresentation, 8 U.S.C. 1182(i); cancellation of removal, 8 U.S.C. 1229b; voluntary departure, 8 U.S.C. 1229c; and adjustment of status, 8 U.S.C. 1255. And each of those sections contains language specifying that the decision is entrusted to the Attorney General's discretion.[16] All of the decisions made unreviewable by

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[16] See 8 U.S.C. 1182(h) ("The Attorney General may, in his discretion, waive the application of [various inadmissibility grounds based on criminal offenses]."); 8 U.S.C. 1182(i)(1) ("The Attorney General may, in the discretion of the Attorney General, waive the application of [inadmissibility based on fraud or misrepresentation]."); 8 U.S.C. 1229b(a),

Section 1252(a)(2)(B)(i), then, are decisions of the Attorney General, the discretionary nature of which is explicitly provided by statute.

Like clause (i), clause (ii) precludes judicial review of discretionary decisions made by the Attorney General. And like clause (i), clause (ii) limits its reach to decisions for which the Attorney General's authority is provided in Subchapter II of Chapter 12 of Title 8 of the United States Code. Compare 8 U.S.C. 1252(a)(2)(B)(i) (referring to administrative "judgment[s]" under five sections in Subchapter II), with 8 U.S.C. 1252(a)(2)(B)(ii) (applying to any other decision or action the "authority" for which is "specified under this subchapter"). The key difference between the two provisions is that in the former, Congress specifically enumerated the administrative judgments that would be insulated from judicial review, while in the latter, Congress included a catch-all provision for "any other decision or action" of the same nature. Read together, the two provisions make clear that Congress intended to limit judicial review of discretionary decisions only where Congress itself set out the Attorney General's decisionmaking authority in the statute.

2. The same is true with respect to the other parts of Section 1252(a)(2) that limit judicial review. Like Section 1252(a)(2)(B), both Section 1252(a)(2)(A) and Section 1252(a)(2)(C) rely on statutes, rather than regula-

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(b)(1)-(2) ("The Attorney General may cancel removal [of certain aliens]."); 8 U.S.C. 1229c(a)(1) ("The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense."); 8 U.S.C. 1255(a) ("[T]he status of an alien * * * may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence.").

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tions, to define their scope. Section 1252(a)(2)(A), for example, precludes judicial review of certain decisions by immigration officers regarding admissibility by reference to another statutory provision, 8 U.S.C. 1225(b)(1). In particular, Section 1252(a)(2)(A) states that "no court shall have jurisdiction to review" "any individual determination" or "cause or claim arising from or relating to the implementation or operation of" a removal order entered under Section 1225(b)(1), 8 U.S.C. 1252(a)(2)(A)(i); "a decision by the Attorney General to invoke the provisions of such section," 8 U.S.C. 1252(a)(2)(A)(ii); "the application of such section to individual aliens," including a "determination [regarding asylum eligibility] made under 1225(b)(1)(B)," 8 U.S.C. 1252(a)(2)(A)(iii); and "procedures and policies adopted by the Attorney General to implement" Section 1225(b)(1), 8 U.S.C. 1252(a)(2)(A)(iv).[17] All of those jurisdictional limitations depend on statutory provisions; none depends on a regulation.

Similarly, Section 1252(a)(2)(C) refers to various other statutory provisions in barring judicial review of removal orders entered against certain criminal aliens. It provides that "no court shall have jurisdiction to review" any final order of removal "against an alien who is removable" because he committed a criminal offense covered in 8 U.S.C. 1182(a)(2); an offense covered by 8 U.S.C. 1227(a)(2)(A)(iii), (B), (C) or (D); or certain offenses covered by 8 U.S.C. 1227(a)(2)(A)(i). 8 U.S.C. 1252(a)(2)(C). Again, nothing in the criminal alien bar

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[17] The first, third, and fourth of those jurisdictional limitations are subject to the exceptions noted in 8 U.S.C. 1252(a). See 8 U.S.C. 1252(a)(2)(A)(i), (iii) and (iv).

makes the federal courts' jurisdiction depend upon a regulation.

By defining the various jurisdictional bars by reference to other provisions in the INA itself, Congress ensured that it, and only it, would limit the federal courts' jurisdiction over immigration matters. To read Section 1252(a)(2)(B)(ii) to apply to matters where discretion is conferred on the Board and the IJs by regulation, rather than on the Attorney General by statute, would ignore that congressional design.

3. Finally, and significantly, one other provision in Section 1252 confirms that Section 1252(a)(2)(B)(ii) does not bar judicial review of motions to reopen. Section 1252(b) sets out various procedural requirements for judicial review of removal orders, including the requirement that, "[w]hen a petitioner seeks review of a[] [removal] order," "any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order." 8 U.S.C. 1252(b)(6).

Section 1252(b)(6) reflects Congress's understanding that the courts of appeals generally have jurisdiction to review challenges to denials of motions to reopen. See *Stone* v. *INS*, 514 U.S. 386, 394 (1995) (predecessor to Section 1252(b)(6) "contemplates two petitions for review and directs the courts to consolidate the matters"). After all, the consolidation provision would have neither purpose nor function if denials of motions to reopen were not reviewable in the first instance. See *Singh*, 404 F.3d at 1027; *Infanzon*, 386 F.3d at 1362. Section 1252(b)(6)'s predecessor was enacted six years prior to IIRIRA, see Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 5065 (8 U.S.C. 1105(a)(6) (1994)), and Congress presumably would have eliminated such a provision if it intended to bar review

of motions to reopen when it comprehensively revised the judicial review provisions of the INA in 1996 and added Section 1252(a)(2)(B)(ii). See, *e.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1445 (2009). Instead, Congress included Section 1252(b)(6) along with Section 1252(a)(2)(B)(ii).

The court of appeals incorrectly minimized the importance of Section 1252(b)(6). In its view, Section 1252(b)(6) has meaning even if Section 1252(a)(2)(B)(ii) applies to motions to reopen, because denials of such motions may be reviewed (and so, petitions for review may be consolidated) if they raise constitutional claims or questions of law under Section 1252(a)(2)(D). Pet. App. 9a. This rationale is mistaken. The court of appeals' interpretation would have rendered Section 1252(b)(6) a nullity with respect to motions to reopen from the time that Section 1252(a)(2)(B)(ii) was enacted in 1996 to the time that Section 1252(a)(2)(D) was added to the INA in 2005. There is no reason to suppose that Congress left such a nine-year gap.

### C. The History Of The Immigration Laws Confirms That Congress Did Not Intend Section 1252(a)(2)(B)(ii) To Preclude Judicial Review Of Denials Of Motions To Reopen

Motions to reopen have a long pedigree, and the federal courts historically have exercised jurisdiction to review them. When Congress enacted Section 1252(a)(2)(B)(ii) in 1996, it made no effort to change that practice, even though it easily could have done so by codifying the pre-existing regulation specifying that motions to reopen are entrusted to the Attorney General's broad discretion. That history confirms that Con-

gress did not intend Section 1252(a)(2)(B)(ii) to preclude judicial review of denials of motions to reopen.

1. Motions to reopen have long been a part of our Nation's immigration laws. See *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008) (citing *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916), and *Chew Hoy Quong* v. *White*, 244 F. 749, 750 (9th Cir. 1917)). The federal courts historically could review the denial of reopening, although they did not second-guess the agency's decisionmaking so long as the agency afforded the alien a fair process. *Ibid.* ("The reopening of a case by the immigration authorities for the introduction of further evidence" was "a matter for the exercise of their discretion." (internal quotation marks omitted)); see *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam) (denial of a motion to reopen or reconsider is reviewable on petition for review in court of appeals); see also *INS* v. *Chadha*, 462 U.S. 919, 937-938 (1983) (noting that judicial review extends to "determinations made incident to a motion to reopen such proceedings" (internal quotation marks omitted)); *Cheng Fan Kwok*, 392 U.S. at 211, 216 (discussing *Giova* v. *Rosenberg*).

The Executive Branch's immigration authority was centralized in the Attorney General in 1940, see *BIA Celebrates 50th Anniversary*, 67 Interpreter Releases 1221 (1990), and soon thereafter he issued regulations addressing motions to reopen, see 6 Fed. Reg. 68, 71-72 (1941). In 1958, the Attorney General promulgated a new set of rules for reopening that are substantially the same as those in operation today. 23 Fed. Reg. 9115, 9118-9119; see *Dada*, 128 S. Ct. at 2315. They authorized the Board to reopen "any case in which it has rendered a decision," either *sua sponte* or upon written motion of the government or the alien, and provided vari-

ous procedural requirements for filing a motion to reopen, including the requirement that the motion must "state the new facts to be proved at the reopened hearing" and be "supported by affidavits or other evidentiary material." 23 Fed. Reg. at 9118 (codified at 8 C.F.R. 3.2, 3.8(a) (1965)).

In 1990, Congress became concerned that aliens illegally present in the United States were using motions to reopen to prolong their stay. See *Dada*, 128 S. Ct. at 2315. Congress therefore directed the Attorney General to issue regulations to limit the number of motions to reopen an alien may file and to specify the time period for the filing of such motions. IMMACT § 545(d), 104 Stat. 5066. The Attorney General promulgated the final regulations in 1996; in addition to including time and numerical limits, 61 Fed. Reg. 18,900, 18,905 (8 C.F.R. 3.2(c)(2) (1997) (current version at 8 C.F.R. 1003.2(c)), they provided that the decision whether to grant or deny a motion to reopen is committed to the discretion of the Board, *id.* at 18,904 (amending 8 C.F.R. 3.2(a) (1997) (current version at 8 C.F.R. 1003.2(a)).

Although Congress's legislation in 1990 was intended to expedite petitions for review and the removal process generally, see *Stone*, 514 U.S. at 400-401, Congress refrained from any steps to preclude judicial review of motions to reopen altogether in order to accomplish that goal. Congress merely attempted to streamline the judicial review process, by enacting the directive that whenever an alien seeks judicial review of a final order of deportation, a subsequent petition for review of a denial of reopening must be consolidated with the earlier petition. See IMMACT § 545(b)(3), 104 Stat. 5065.

2. The first statutory provisions allowing an alien to file a motion to reopen were added to the INA in 1996 as

part of IIRIRA. See *Dada*, 128 S. Ct. at 2316 (IIRIRA "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien"). Congress provided that each alien may file one motion to reopen, and it codified several of the Attorney General's limitations on motions to reopen, including the numerical and time limits specified by regulation. See IIRIRA § 304(a)(3), 110 Stat. 3009-593 (enacting 8 U.S.C. 1229a(c)(6) (Supp. II 1996) (current version at 8 U.S.C. 1229a(c)(7)). Notably, however, Congress did not enact into law the regulation that provided that the decision to grant or deny a motion to reopen lies within the Board's discretion. See *Zhao*, 404 F.3d at 302-303; *Medina-Morales*, 371 F.3d at 528.

In the same legislation, Congress sought once more and yet more aggressively to expedite the removal of illegal aliens from the United States. See *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). To that end, Congress amended the INA to limit judicial review of certain decisions of the Attorney General and the Secretary. See IIRIRA § 306(a)(2), 110 Stat. 3009-607. One of those limitations is the bar on judicial review at issue here, which precludes review of decisions of the Attorney General or the Secretary that are specified in the relevant subchapter as within their discretion. *Ibid.* (8 U.S.C. 1252(a)(2)(B)(ii)). As previously noted, however, Congress did not specify anywhere in the relevant subchapter that decisions whether to grant motions to reopen are within the discretion of the Attorney General. As a result, both before and after IIRIRA, the Attorney General's discretion to decide motions to reopen "still 'derives solely from *regulations* promulgated by the Attorney General' rather than from a statute."

*Medina-Morales*, 371 F.3d at 528 (quoting *Doherty*, 502 U.S. at 322).

Thus, Congress simultaneously codified a process for the filing of motions to reopen and acted to limit judicial review of certain decisions regarding removal, yet did not take any steps to insulate denials of motions to reopen from judicial review. Congress easily could have done so, simply by codifying the regulation providing the Board with broad discretion to grant or deny motions to reopen. That Congress did not do so confirms that it did not intend to preclude judicial review of denials of motions to reopen in enacting IIRIRA. See *Medina-Morales*, 371 F.3d at 528-529 ("We cannot ignore that Congress, in enacting IIRIRA, expressly referred to 'authority . . . specified under this subchapter to be in the discretion of the Attorney General' at the same time it enacted a first-time provision addressing motions to reopen (§ 1229a(c)), but said nothing about the Attorney General's discretionary authority over such motions.").

Congress's intent becomes especially clear when viewed against the backdrop of the federal courts' long history of reviewing denials of motions to reopen. This Court has reviewed such decisions on numerous occasions, under the deferential abuse-of-discretion standard, see, *e.g.*, *Doherty*, 502 U.S. at 322-324; *INS* v. *Abudu*, 485 U.S. 94, 104-111 (1998); *INS* v. *Rios-Pineda*, 471 U.S. 444, 449-452 (1985); *Jong Ha Wang*, 450 U.S. at 141-146, and federal-court review dates back to at least 1916, see *Dada*, 128 S. Ct. at 2315 (citing cases).[18] In

[18] The courts of appeals likewise have reviewed denials of motions to reopen under the highly deferential abuse of discretion standard, generally upholding the Board's decision "so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so irrational that it is arbitrary rather than the result of any perceptible

light of that "long-standing practice," *Miah*, 519 F.3d at 789 n.1, as well as the general presumption in favor of judicial review of agency actions, see *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), Congress surely would have spoken clearly in 1996 if it intended to limit judicial review of decisions on motions to reopen. But Congress made no such statement. To the contrary, Congress reenacted the provision, first enacted by IMMACT in 1990, for consolidation of a petition for review of the denial of a motion to reopen with a petition for review of the final removal order, thereby confirming that both kinds of review would remain available.[19]

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The court of appeals' holding that it lacked jurisdiction to review the denial of a motion to reopen under

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rational approach." *Zhao*, 404 F.3d at 304 (internal quotation marks omitted); see, *e.g.*, *Larngar* v. *Holder*, 562 F.3d 71, 74 (1st Cir. 2009); *Bi Feng Liu* v. *Holder*, 560 F.3d 485, 489-490 (6th Cir. 2009); *Ahmed* v. *Mukasey*, 548 F.3d 768, 770 (9th Cir. 2008); *Zine* v. *Mukasey*, 517 F.3d 535, 542 (8th Cir. 2008); *Montano Cisneros* v. *United States Att'y Gen.*, 514 F.3d 1224, 1226 (11th Cir. 2008); *Thongphilack* v. *Gonzales*, 506 F.3d 1207, 1209 (10th Cir. 2007); *Barry* v. *Gonzales*, 445 F.3d 741, 744-745 (4th Cir. 2006), cert. denied, 549 U.S. 1182 (2007); *Kaur* v. *Board of Immigration Appeals*, 413 F.3d 232, 233-234 (2d Cir. 2005) (per curiam); *Infanzon*, 386 F.3d at 1362; *Guo* v. *Ashcroft*, 386 F.3d 556, 561-562 (3d Cir. 2004).

[19] In light of the clarity of Section 1252(a)(2)(B)(ii)'s text, the strong support from the provision's context and history, and the general presumption in favor of judicial review, this is not an appropriate case in which to resort to the proposition that ambiguities should be construed in favor of the alien. See, *e.g.*, *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007) (court must use every interpretative tool at its disposal before considering whether remaining ambiguities should be resolved in favor of the alien). Indeed, petitioner did not argue below that any ambiguities in 8 U.S.C. 1252(a)(2)(B)(ii) should be resolved in his favor.

8 U.S.C. 1252(a)(2)(B)(ii) was error. The court also observed, however, that the denial of petitioner's second motion to reopen would be reviewed for abuse of discretion and that "[i]t is difficult to perceive an abuse of discretion" here. Pet. App. 3a. That conclusion was correct, essentially for the reasons the court of appeals suggested. See *ibid.*; see also p. 11, *supra*. But this Court need not itself consider that fact-bound question. The Court should reverse the court of appeals' dismissal for lack of jurisdiction and return the case to the court of appeals for further proceedings.

## CONCLUSION

The judgment of the court of appeals dismissing the petition for review for lack of jurisdiction should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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## APPENDIX

1. 8 U.S.C. 1229a provides, in pertinent part:

**Removal proceedings**

* * * * *

**(5) Consequences of failure to appear**

**(A) In general**

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

**(B) No notice if failure to provide address information**

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

**(C) Rescission of order**

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

**(D) Effect on judicial review**

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

**(E) Additional application to certain aliens in contiguous territory**

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under

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this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

* * * * *

**(7) Motions to reopen**

**(A) In general**

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

**(B) Contents**

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

**(C) Deadline**

**(i) In general**

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

**(ii) Asylum**

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country condi-

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[1] So in original.

tions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

**(iii) Failure to appear**

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

**(iv) Special rule for battered spouses, children, and parents**

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,[2] section 1229b(b)(2) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General

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[2] So in original.

may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[3] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

* * * * *

**(e) Definitions**

In this section and section 1229b of this title:

**(1) Exceptional circumstances**

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

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[3] So in original. A closing parenthesis probably should appear.

2. 8 U.S.C. 1252 provides, in pertinent part:

**Judicial review of orders of removal**

**(a) Applicable provisions**

**(1) General orders of removal**

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

**(2) Matters not subject to judicial review**

**(A) Review relating to section 1225(b)(1)**

Notwithstanding any other provision of law (statutory or nonstatutory), including Section 2241 or title 28, or any other habeas corpus provision, and Sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subjection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination

made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

**(B) Denials of discretionary relief**

Nothwithstanding any other provision of law (statutory or nonstatutory), including Section 2241 of title 28, or any other habeas corpus provision, and Section 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General of the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

**(C) Orders against criminal aliens**

Notwithstanding any other provision of law (statutory or nonstatutory), including Section 2241 of title 28, or any other habeas corpus provision, and Sections 1361 and 1651 of such title,

and except as provided by law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

**(D) Judicial review of certain legal claims**

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * * *

**(b) Requirements for review of orders of removal**

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

* * * * *

**(6) Consolidation with review of motions to reopen or reconsider**

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen

or reconsider the order shall be consolidated with the review of the order.

* * * * *

3. 8 C.F.R. 1003.2 provides, in pertinent part:

**Reopening or reconsideration before the Board of Immigration Appeals.**

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

* * * * *

(c) *Motion to reopen.*

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board

that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final

administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provision of § 1003.23(b)(4)(iii)(A)(*1*) or § 1003.23 (b)(4)(iii)(A)(*2*);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a

motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

(d) *Departure, deportation, or removal.* A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

(e) *Judicial proceedings.* Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding. If a motion to reopen or reconsider seeks discretionary relief, the motion shall include a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is being filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution.

(f) *Stay of deportation.* Except where a motion is filed pursuant to the provisions of §§ 1003.23(b)(4)(ii) and 1003.23(b)(4)(iii)(A), the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board, the Immigration Judge, or an authorized officer of the Service.

(g) *Filing procedures—*

(1) *English language, entry of appearance, and proof of service requirements.* A motion and any submission made in conjunction with a motion must be in English or accompanied by a certified English translation. If the moving party, other than the Service, is represented, Form EOIR-27, Notice of Entry of Appearance as Attorney or Representative Before the Board, must be filed with the motion. In all cases, the motion shall include proof of service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed before the Immigration Judge.

(2) *Distribution of motion papers.*

(i) A motion to reopen or motion to reconsider a decision of the Board pertaining to proceedings before an Immigration Judge shall be filed directly with the Board. Such motion must be accompanied by a check, money order, or fee waiver request in satisfaction of the fee requirements of § 1003.8. The record of proceeding pertaining to such a mo-

tion shall be forwarded to the Board upon the request or order of the Board.

(ii) A motion to reopen or a motion to reconsider a decision of the Board pertaining to a matter initially adjudicated by an officer of the Service shall be filed with the officer of the Service having administrative control over the record of proceeding.

(iii) If the motion is made by the Service in proceedings in which the Service has administrative control over the record of proceedings, the record of proceedings in the case and the motion shall be filed directly with the Board. If such motion is filed directly with an office of the Service, the entire record of proceeding shall be forwarded to the Board by the Service officer promptly upon receipt of the briefs of the parties, or upon expiration of the time allowed for the submission of such briefs.

(3) *Briefs and response.* The moving party may file a brief if it is included with the motion. If the motion is filed directly with the Board pursuant to paragraph (g)(2)(i) of this section, the opposing party shall have 13 days from the date of service of the motion to file a brief in opposition to the motion directly with the Board. If the motion is filed with an office of the Service pursuant to paragraph (g)(2)(ii) of this section, the opposing party shall have 13 days from the date of filing of the motion to file a brief in opposition to the motion directly with the office of the Service. In all cases, briefs and any other filings made in conjunction with a motion shall include proof of service on the opposing party. The Board, in its discretion, may extend the time within which such brief is to be submitted and may authorize the filing

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of a brief directly with the Board. A motion shall be deemed unopposed unless a timely response is made. The Board may, in its discretion, consider a brief filed out of time.

(h) *Oral argument.* A request for oral argument, if desired, shall be incorporated in the motion to reopen or reconsider. The Board, in its discretion, may grant or deny requests for oral argument.

(i) *Ruling on motion.* Rulings upon motions to reopen or motions to reconsider shall be by written order. Any motion for reconsideration or reopening of a decision issued by a single Board member will be referred to the screening panel for disposition by a single Board member, unless the screening panel member determines, in the exercise of judgment, that the motion for reconsideration or reopening should be assigned to a three-member panel under the standards of § 1003.1(e)(6). If the order directs a reopening and further proceedings are necessary, the record shall be returned to the Immigration Court or the officer of the Service having administrative control over the place where the reopened proceedings are to be conducted. If the motion to reconsider is granted, the decision upon such reconsideration shall affirm, modify, or reverse the original decision made in the case.

4. 8 C.F.R. 1003.23 provides, in pertinent part:

**Reopening or reconsideration before the Immigration Court.**

(a) *Pre-decision motions.* Unless otherwise permitted by the Immigration Judge, motions submitted prior

to the final order of an Immigration Judge shall be in writing and shall state, with particularity the grounds therefore, the relief sought, and the jurisdiction. The Immigration Judge may set and extend time limits for the making of motions and replies thereto. A motion shall be deemed unopposed unless timely response is made.

(b) *Before the Immigration Court—*

(1) *In general.* An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall such limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

(i) *Form and contents of the motion.* The motion shall be in writing and signed by the affected party or the attorney or representative of record, if any. The motion and any submission made in conjunction with it must be in English or accompanied by a certified English translation. Motions to reopen or reconsider shall state whether the validity of the exclusion, deportation, or removal order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. In any case in which an exclusion, deportation, or removal order is in effect, any motion to reopen or reconsider such order shall include a statement by or on behalf of the moving party declaring whether the subject of the order is also the subject of any pending criminal proceeding under the Act, and, if so, the current status of that proceeding.

(ii) *Filing.* Motions to reopen or reconsider a decision of an Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceeding. A motion to reopen or a motion to reconsider shall include a

certificate showing service on the opposing party of the motion and all attachments. If the moving party is not the Service, service of the motion shall be made upon the Office of the District Counsel for the district in which the case was completed. If the moving party, other than the Service, is represented, a Form EOIR-28, Notice of Appearance as Attorney or Representative Before an Immigration Judge must be filed with the motion. The motion must be filed in duplicate with the Immigration Court, accompanied by a fee receipt.

(iii) *Assignment to an Immigration Judge.* If the Immigration Judge is unavailable or unable to adjudicate the motion to reopen or reconsider, the Chief Immigration Judge or his or her delegate shall reassign such motion to another Immigration Judge.

(iv) *Replies to motions; decision.* The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the Immigration Judge.

(v) *Stays.* Except in cases involving in absentia orders, the filing of a motion to reopen or a motion to reconsider shall not stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Immigration Judge, the Board, or an authorized officer of the Service.

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(3) *Motion to reopen.* A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could have not been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply thereof was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) of the Act, or (a)(4), whichever is earliest. The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) *Exceptions to filing deadlines*—

(i) *Asylum and withholding of removal.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien may request a stay and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by the Immigration Judge. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia or removal proceedings.* An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not

receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state custody and the failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge. An alien may file only one motion pursuant to this paragraph.

(iii) *Order entered in absentia in deportation or exclusion proceedings.*

(A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

(*1*) Within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances); or

(*2*) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

(B) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

(C) The filing of a motion to reopen under paragraph (b)(4)(iii)(A) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(D) The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii)(A) of this section.

(iv) *Jointly filed motions.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen agreed upon by all parties and jointly filed.

# REPLY BRIEF

Supreme Court, U.S.
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No. 08-911

IN THE
# Supreme Court of the United States

AGRON KUCANA,
*Petitioner,*

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF

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## INTRODUCTION

Amicus contends that the word "under" in § 1252(a)(2)(B)(ii) – which deprives courts of jurisdiction to review decisions or actions of the Attorney General "the authority for which is specified" to be discretionary "under this subchapter" – must be read as meaning "subordinate" or "pursuant to," rather than "according to" or "within." That argument is wrong. The only "natural" reading of § 1252(a)(2)(B)(ii), *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2332-33 (2008), is one that requires the "authority . . . specified under this subchapter" to actually appear somewhere in the referenced portion of the statute. That reading is required by the language of § 1252 itself, as well as by the language of other relevant statutory provisions, and it is wholly consistent with the legislative history. It is also the only reading that does not give rise to extraordinary consequences that Congress is very unlikely to have intended. Moreover, even were § 1252(a)(2)(B)(ii) thought to be ambiguous (which it is not), Petitioner's reading is dictated by multiple applicable canons of construction – including the canon against jurisdiction-stripping, which requires a clear statement by Congress before insulating agency action from judicial review. Finally, even were Amicus's interpretation of the statute correct, her argument fails for an independently sufficient reason: the regulation that she identifies as the requisite specification of discretionary authority was not issued "under" the correct subchapter of the statute.

## ARGUMENT

### I. The Attorney General's Authority To Deny A Motion To Reopen Is Not Specified To Be Discretionary "Under" The Relevant Subchapter.

#### A. The Language Of The Statute Requires That The Specification Of Discretionary Authority Appear In The Statute, Not In A Regulation.

1. As Amicus recognizes, there are many definitions of the word "under." *See Ardestani v. INS*, 502 U.S. 129, 135 (1991). Those definitions include "according to," *Black's Law Dictionary* 1695 (Rev. 4th ed. 1968), "within," *American Heritage College Dictionary* 1874 (4th ed. 2000); *see also Webster's Third New International Dictionary* 2487 (1993) ("within the grouping or designation"), and "[d]enoting occurrence in a particular section or article of a . . . work," *Compact Oxford English Dictionary* 2158 (2d ed. 1991) – all definitions that accord with the interpretation of the statute set forth by Petitioner and the United States and adopted by every court of appeals to address the question except the court below. *See, e.g., Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 146 (3d Cir. 2004) (interpreting § 1252(a)(2)(B)(ii) and stating that "the language of the statute in question must provide the discretionary authority before the bar can have any effect" (internal quotation marks omitted)).

To be sure, given the different dictionary definitions of the word "under," it "must draw its meaning from its context." *Ardestani*, 502 U.S. at 135. But Amicus's own examples definitively demonstrate why the "context" of § 1252(a)(2)(B)(ii)

does not in any way suggest that the word "under" refers to a subordinate relationship like the relationship of a regulation to its authorizing statute. Amicus lists hundreds of statutory provisions in which regulations are described as being issued "under" a statute. *See* Amicus Br. Appendix A. In *every single one* of those examples, Congress *expressly* used the word "regulations." Amicus has not come forward with a single instance in which Congress used the word "under" unaccompanied by the word "regulations" to refer to a regulatory scheme. It would have been easy for Congress to write § 1252(a)(2)(B)(ii) to mirror the provisions in Amicus's appendix and cover decisions or actions the authority for which is specified to be discretionary in regulations promulgated under the subchapter, but "Congress did not write the statute that way." *Corley v. United States*, 129 S. Ct. 1558, 1567 (2009) (internal quotation marks omitted).

Congress has, however, supplied many examples of statutory provisions that refer to things "specified under" certain statutory provisions where "under" can be read only to mean "within." *See, e.g.*, 11 U.S.C. § 522(b)(2) (providing that a debtor in bankruptcy proceedings may exempt from property of the estate "property that is specified under subsection (d)"); *id.* § 522(d) (providing a list of twelve specific types of property, such as real property, motor vehicles, and life insurance contracts); 6 U.S.C. § 1138(g) (grantee of terrorism prevention research grants must return funds if Secretary determines they were used "for a purpose other than the allowable uses specified under

subsection (c) of this section"); *id.* § 1138(c)(2)(A)-(G) (list of seven types of research for which grant money "may be used"). There is nothing mysterious about Congress's use of the passive voice in these provisions; Congress does not refer to itself in a statute except in unusual situations in which future legislative action is expressly contemplated. *See, e.g.*, 50 U.S.C. § 1706(b).

2. Congress also gave various "textual cues," Amicus Br. 21, showing that "under" in § 1252(a)(2)(B)(ii) cannot be read the way that Amicus asks this Court to read it – cues that Amicus misinterprets or ignores when discussing the operative statutory language. First, § 1252(a)(2)(B)(ii) refers not to "any" decision or action "the authority for which is specified under this subchapter to be in the discretion of the Attorney General," but rather to "any *other*" such decision or action. 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added); *compare* Amicus Br. 5, 22. In other words, § 1252(a)(2)(B)(ii) refers to the same kind of specification of discretionary authority encompassed by § 1252(a)(2)(B)(i), the immediately preceding subsection. Each and every one of the provisions listed in § 1252(a)(2)(B)(i) is a *statutory* provision that grants the Attorney General discretion, and each provision is one "under" which relief can be granted. Accordingly, it is clear that when Congress referred to "any other" specification "under the

subchapter" it likewise had statutory provisions in mind.[1]

Of course, even if the statute simply read "any," that would not advance Amicus's argument. Including everything that is within a specifically described category does not enlarge the category or render it limitless. The question in this case is the scope of the category described in § 1252(a)(2)(B)(ii) – identifying *which* authority for decisions or actions is specified to be discretionary "under th[e] subchapter." The phrase "any other" is instructive on that question, but the word "any" is not.

Second, Amicus omits virtually any mention of the fact that § 1252(a)(2)(B)(ii) speaks of decisions or actions "*the authority for which*" is made discretionary "under this subchapter." 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added). The reference to the Attorney General's "authority" makes clear that the source of the specification must be a statute and not a regulation – after all, Congress is the body

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[1] Similarly, an exception to the jurisdictional bar of § 1252(a)(2)(B)(ii) is the "granting of relief under" a *statutory* provision that gives the Attorney General discretion over asylum decisions. Amicus suggests that this provision, 8 U.S.C. § 1158, does not actually grant discretion, *see* Amicus Br. 19 n.8, but § 1158(b) states that the Attorney General "may" grant asylum, *see* Pet'r Br. 18 & n.7. Relatedly, Amicus argues that the statutory provision governing motions to reopen, § 1229a(c)(7), can be thought to confer discretion simply by virtue of stating that such a motion might conceivably be granted. *See* Amicus Br. 19 n.8. But, of course, whether a motion might or might not be granted says nothing about the existence of discretion on the part of the decisionmaker. *See, e.g., Soltane*, 381 F.3d at 148 n.3.

that confers "authority" on the executive, and the Attorney General can hardly be said to give himself "authority" to act. This point is underscored by the provision of Title 8 that Amicus identifies as authorizing the Attorney General to issue the regulation at issue in this case, which states that the Attorney General is empowered to act to "carry[] out his authority under the provisions of this chapter," 8 U.S.C. § 1103(a)(3) – that is, the authority that Congress has granted him. Because only Congress can define the bounds of the Attorney General's authority, it is only Congress that can act "under this subchapter" within the meaning of § 1252(a)(2)(B)(ii).

Third, Amicus's reliance on the phrase "statutory or nonstatutory," added by a 2005 amendment to the portion of the statute that introduces § 1252(a)(2)(B)(i) and (ii), is misplaced. Congress made clear its intent that § 1252(a)(2)(B)(ii) apply "[n]otwithstanding any other provision of law," whether "statutory or nonstatutory." But again, that phrase says nothing about the scope of § 1252(a)(2)(B)(ii) itself. And a Congress that was newly attentive to "the role that regulatory provisions play in the immigration context," Amicus Br. 23, and that shared Amicus's reading of the language of § 1252(a)(2)(B)(ii), could have been expected to make its intentions clear by adding a reference to "nonstatutory" provisions to the portion of clause (ii) that discusses where the Attorney General's discretion must be specified. That is particularly so in light of the fact that at the time of the 2005 amendment courts had already ruled that review of motions to reopen was not barred pursuant

to § 1252(a)(2)(B)(ii) by the existence of the regulation on which Amicus places her reliance. *See, e.g., Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004).

3. In addition to the "textual cues" in § 1252 itself, there are a number of other strong indications in the statutory scheme that Amicus's interpretation of the provision at issue cannot be correct. First, under Amicus's view of the statute at least two different provisions would have been wholly superfluous at the time of enactment: 8 U.S.C. § 1252(b)(6), governing consolidation of judicial review of motions to reopen with other matters, and 8 U.S.C. § 1229a(b)(5)(A), addressing judicial review of *in absentia* removal orders. *See* Pet'r Br. 29-30. Amicus grapples with this issue only in a footnote, suggesting that § 1252(b)(6) was no longer superfluous after the 2005 enactment of § 1252(a)(2)(D). *See* Amicus Br. 29-30 n.10. But Amicus does not explain how that later enactment sheds any light on the intent of the Congress that passed the 1996 statute containing the language at issue in this case, or why Congress would have wanted a useless consolidation provision in place for nine full years. Amicus also suggests that Congress was simply preparing for the possibility that the Attorney General would change the regulations so as to make motions to reopen reviewable. But this would be a strange and inefficient way for Congress to proceed — and, indeed, accepting Amicus's argument would vitiate the canon counseling in favor of giving effect to all statutory provisions, since it can always be argued that a superfluous provision is

simply being held in reserve lest there be a later change in the law.

Second, it is notable that in enacting IIRIRA in 1996, in which Congress substantively addressed motions to reopen for the first time, Congress borrowed many things from the existing regulation governing such motions – the very regulation that Amicus makes much of – but chose not to codify in the statute the regulatory language making reopening decisions discretionary. For instance, the procedural requirements for motions to reopen found in § 1229a(c)(7) are drawn from the reopening regulation that predated the statute's enactment. *See* Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900, 18,904-05 (Apr. 29, 1996) (containing the regulatory language added just before the statute was passed and eventually codified as 8 C.F.R. § 1003.2). That regulation gave Congress a template, should it have wished to use it, for stating that decisions on motions to reopen were within the Attorney General's discretion. Yet even while inserting throughout subchapter II more than thirty references to the Attorney General's discretionary authority on various matters, *see* Pet'r Br. 19, in drafting the provision on motions to reopen Congress did not include any such reference. This suggests that Congress made a deliberate decision not to trigger § 1252(a)(2)(B)(ii) – and that Amicus's interpretation would amount to an end run around Congress's intentional exclusion.

Finally, Amicus's approach does not give force under § 1252(a)(2)(B)(ii) to the many provisions in

the relevant subchapter in which Congress did expressly discuss the Attorney General's discretion. Although Amicus asserts that her interpretation of § 1252(a)(2)(B)(ii) covers specifications of discretion in the statute as well as in the regulations, it is not clear how her definition of "under" could possibly cover the statutory provisions, since she asserts that under means "a position below or lower than" and "inferior or subordinate in rank or importance." Amicus Br. 15 (internal quotation marks omitted). Provisions in subchapter II of the statute itself are not specifications that are "below" or "inferior" to the subchapter. Thus, Amicus's reading of the statute appears to have the perverse result of depriving courts of jurisdiction to review decisions made discretionary by regulation, *but not* decisions made discretionary only by statute – even though Congress took the trouble to list many such decisions. That reading cannot be reconciled with Congress's carefully constructed scheme.

For all of these reasons, it is not possible to select Amicus's definition of the word "under" from dictionaries and style manuals and treat that definition as controlling in this case. In every conceivable respect, the language of *this* statute demonstrates that § 1252(a)(2)(B)(ii) uses the word "under" to mean "according to" or "within," so that a specification of discretionary authority has force only if it appears in the statute itself.

### B. Nothing In The Legislative History Supports Amicus's Position.

The legislative history of § 1252(a)(2)(B)(ii) is exceedingly thin. This is not surprising, since, as Amicus points out, the provision was a last-minute addition to the 1996 immigration statute (and, therefore, can hardly be said to be central to carrying out that statute's purposes). Amicus Br. 33. But Amicus makes sweeping statements about Congress's intent, and then seizes on a single phrase from a conference report, and on a single sentence from a law review article written by a statutory sponsor, in order to declare that "specific" legislative history supports her view of the meaning of the word "under." Amicus Br. 26, 28. In fact, nothing in these insubstantial snippets – or in any other part of the history of the statute – supports Amicus's position.

As an initial matter, Amicus's argument that the general intent of IIRIRA was to "streamline the deportation process and prevent aliens from abusing the court system," Amicus Br. 29, sheds no light on the meaning of § 1252(a)(2)(B)(ii). While reducing the jurisdiction of the courts can be said to streamline the process of hearing immigrants' claims, eliminating all judicial review would streamline the process even more. But that is not what Congress chose to do. The question at issue in this case is the precise degree to which Congress chose to restrict judicial review, and an argument about Congress's general purposes – the "last redoubt of losing causes" – cannot possibly supply an answer to that question. *Director, Office of Worker's Comp. Programs v. Newport News Shipbuilding &*

*Dry Dock Co.*, 514 U.S. 122, 135 (1995). After all, "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means – and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two." *Id.* at 136; *see also, e.g., Rapanos v. United States*, 547 U.S. 715, 752 (2006) ("[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations.").

That principle is particularly germane in this case. For one thing, placing weight on the general purposes of IIRIRA is inconsistent with the long-standing rule that in order to deprive the courts of jurisdiction over agency action Congress must make a clear textual statement of its intent. *See* Pet'r Br. 26-28. For another, § 1252(a)(2)(B)(ii) is not the only portion of IIRIRA in which Congress accomplished its purpose of restricting the jurisdiction of the courts – and so it does not make sense to single out § 1252(a)(2)(B)(ii) and give it a broad interpretation in an attempt to effectuate that purpose. *See* 8 U.S.C. § 1252(a)(2)(A) (stripping review over matters relating to 8 U.S.C. § 1225(b)(1)); *id.* § 1252(a)(2)(B)(i) (stripping review over particular, identified discretionary decisions); *id.* § 1252(a)(2)(C) (stripping review over certain orders against criminal aliens).

Amicus fares no better in relying on the conference report or the law review article. With respect to the conference report, Amicus points to a

statement that describes § 1252(a)(2)(B)(ii) as barring judicial review "of any decision or action of the Attorney General which is specified to be in the discretion of the Attorney General." H.R. Rep. No. 104-828, at 219 (1996) (Conf. Rep.). Of course, a conference report cannot override express statutory language through a less than complete summary. *See Bd. of Governors of Fed. Reserve Sys. v. Inv. Co. Inst.*, 450 U.S. 46, 73 n.54 (1981); *see also, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). But, in any event, nothing about the conference report suggests that regulations are a permissible source of the specification of discretionary authority required by the statute. To the contrary, the most likely interpretation of the conference report as read by legislators in the midst of enacting a new statute, which included many specific provisions giving the Attorney General discretionary authority, *see* Pet'r Br. 19, is that it was they themselves who were busy doing the specifying.

As for the law review article, it is not legislative history in any sense, because it expresses the views of a single legislator that were not communicated to the legislative body at the time it was deliberating on the passage of the statute. Moreover, it seems to articulate a view that Amicus does not espouse – that it is only *purely discretionary* decisions by the Attorney General, and not decisions that involve any questions of fact or law, that are unreviewable by the

federal courts. *See* Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L.J. 883, 918-19 (1997) (stating that "issues pertaining to purely discretionary relief" mentioned in § 1252(a)(2)(B)(i), which is not at issue in this case, "should remain within the sole discretion of the Attorney General," but that appeals should remain available where there is "a likelihood of a contested issue of law or fact," and that "asylum, which is not purely a discretionary form of relief, remains appealable"). It is not surprising that Amicus does not take this position, since Petitioner would indisputably prevail under that view of the statute. *See* Pet'r Br. 33 n.15.

### C. Amicus's Interpretation Is Implausible Because It Has Extraordinary Consequences.

Amicus dismisses Petitioner's discussion of the consequences of different interpretations of § 1252(a)(2)(B)(ii) as an expression of "policy preferences" appropriate only for consideration by "policymakers." Amicus Br. 27. To the contrary, however, an examination of such consequences is an interpretive tool – and, in this case, it demonstrates that Amicus's interpretation has extraordinary consequences that are very unlikely to reflect the intent of the enacting Congress.

If Amicus is correct about what § 1252(a)(2)(B)(ii) means, then Congress has given the executive *carte blanche* to insulate its own decisions from appellate review, merely by issuing a regulation dubbing those decisions "discretionary." This kind of delegation of authority is unheard of – not surprisingly, because

its validity is highly suspect. *See* Pet'r Br. 37-39; Law Professors Br. 18-26. Amicus has not supplied any example of any other statutory provision that functions in this unlikely way – presumably because there is none.

Apparently uneasy about the implications of this argument, Amicus protests that Congress itself made the decision about the scope of the courts' jurisdiction over decisions on motions to reopen, because Congress was aware that just a few months earlier the Attorney General had issued a regulation making such decisions discretionary. *See* Amicus Br. 48. This argument does nothing to rationalize the scheme that would exist if Amicus's interpretation of the statute were correct. Under that interpretation, there is nothing stopping the Attorney General from removing the discretion language from the motion to reopen regulation tomorrow, which – in Amicus's view of the world – would suddenly restore jurisdiction over a broad category of cases so as to contravene Congress's original intent in enacting § 1252(a)(2)(B)(ii). There is also nothing stopping the Attorney General from making a wide variety of other immigration decisions discretionary by regulation, thereby ensuring that the courts can never correct even the most abusive and unreasonable executive decisions unless there is a legal or constitutional error. Moreover, under Amicus's interpretation of the statute, it would actually become *impossible* for the Attorney General to make a decision discretionary so as to ensure abuse of discretion review by the courts – because every time the Attorney General mentioned

discretion in one of its regulations, the courts would automatically lose the power to undertake such review. It beggars belief that Congress intended the statute to function in this extraordinary fashion.

That is particularly true given how arbitrary executive immigration decisions often are, and how serious the hardship is for the hapless immigrant whose claims are not given a reasonable hearing – matters of which Congress was also presumably aware when it acted. *See Bridges v. Wixon*, 326 U.S. 135, 154 (1945); Pet'r Br. 34-36; National Immigrant Justice Ctr. Br. 13-21. Amicus does not dispute that courts have found immigration decisions to be infected with disturbing errors at an alarming rate. Indeed, Amicus cites statistics showing the high rate at which federal courts remand cases to the BIA because the BIA's decision is erroneous. *See* Amicus Br. 3 n.1. Under such circumstances, the presumption against jurisdiction-stripping, *see* Pet'r Br. 26-27, is surely at its height.

At the same time, Amicus's restrictive interpretation of § 1252(a)(2)(B)(ii) has no countervailing benefit. The Washington Legal Foundation's brief asserts that frivolous motions to reopen delay resolution of cases and give immigrants a vehicle for extending their stay in this country. *See* WLF Br. 2. But that is not so. Motions to reopen do not stay removal automatically (except, per express statutory command, in the context of a motion to reopen an *in absentia* removal order), and the standard for obtaining a stay is a strict one. *See Nken v. Holder*, 129 S. Ct. 1749, 1760-62 (2009). In addition, motions to reopen provide the government

with the movant's address – hardly the best way for someone under threat of removal from the country to evade the authorities. Forbidding judicial review of decisions on motions to reopen is therefore in no way necessary to curb any abuse of the system.[2]

### D. Even Assuming Any Ambiguity In The Statute, Amicus's Position Must Be Rejected.

All of the arguments set forth above demonstrate that the unambiguous meaning of the statutory text requires a specification of discretionary authority in the statute itself, and not in a regulation. But even if this Court disagrees, it is impossible to say that

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[2] The Washington Legal Foundation also argues that Petitioner's motion to reopen should have been denied solely on the ground that it was his second such motion. *See* WLF Br. 8-16. This issue, which court-appointed Amicus does not press and which requires consideration of the validity of a regulation specifically permitting Petitioner's second motion because it argued changed country conditions, *see* 8 C.F.R. § 1003.2(c)(3)(ii), is outside the scope of the question presented, is not jurisdictional, and is not properly decided here, *see, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 31-34 (1993); S. Ct. R. 14.1(a). Petitioner notes, however, that (1) 8 U.S.C. § 1229a(c)(7)(A) states a minimum, not a maximum, number of motions to reopen; (2) the relevant regulation is authorized by 8 U.S.C. § 1158(a)(2)(C) and (D); (3) the regulation creates a safety valve that is necessary to deal with life-threatening risks due to changed conditions that did not exist earlier in the immigration proceedings, such as a coup in a movant's home country that puts the movant at risk of wrongful imprisonment, torture, or death; and (4) the courts of appeals have accepted that a motion to reopen based on changed country conditions is not subject to a numerical bar, *see, e.g.*, *Shao v. Att'y Gen.*, No. 09-10259, 2009 WL 3104017, at *1 (11th Cir. Sept. 30, 2009).

Amicus has done anything more than make an argument about why the text is ambiguous, on the ground that Congress could have made its meaning still clearer by using the word "in" instead of the word "under." Amicus's protestations that it is her reading that is unambiguously correct, *see, e.g.*, Amicus Br. 25-27, are impossible to credit, since the word "under" admittedly has the meaning "in," Congress has used it that way in other statutory provisions, virtually every Court of Appeals judge to have interpreted the provision has rejected Amicus's approach, and the "textual cues" on which Amicus relies simply beg the question of what the disputed language of § 1252(a)(2)(B)(ii) actually means.

If the statute is ambiguous, then Petitioner must prevail. Other than insisting that there is no ambiguity at all here, Amicus makes no effort to argue that the various canons of construction that Petitioner has invoked – the presumption against stripping review of administrative action without "clear and convincing evidence" that Congress so intended, *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993), the canon that a statute should be construed to give effect to all of its provisions, and the immigration rule of lenity – are inapplicable. These canons do not express "policy preferences," Amicus Br. 27 – they are basic tools of statutory construction, which Congress is presumed to "legislate[] with knowledge of," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991); *see also* Law Professors Br. 3-11. Because Congress has not by any stretch of the imagination made a clear statement that courts lack jurisdiction to review

agency decisions on motions to reopen, the Seventh Circuit's decision to deprive Petitioner of a hearing cannot stand.

## II. In Any Event, The Regulation On Which Amicus Relies Was Not Issued Pursuant To The Relevant Subchapter.

Even assuming that there were any merit to Amicus's strained reading of the statutory language (which there is not), Amicus's argument nevertheless founders on a critical point: the sole regulation on which Amicus relies was issued pursuant to subchapter I of Title 8, Chapter 12 of the U.S. Code, and not, as § 1252(a)(2)(B)(ii) plainly requires, pursuant to subchapter II ("this subchapter").

Amicus agrees that, if it is proper to look in a regulation for the "specific[ation]" of discretion that § 1252(a)(2)(B)(ii) describes, that regulation must be issued pursuant to "Title 8, Chapter 12, Subchapter II of the United States Code" – the subchapter in which § 1252 itself appears. Amicus Br. 40. Amicus identifies the relevant regulation as 8 C.F.R. § 1003.2, and states that the Attorney General's power to issue that regulation stems from 8 U.S.C. § 1103(a), which permits the Attorney General to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." Amicus also correctly notes that § 1103(a) is found in Subchapter I, and not in Subchapter II. Under Amicus's own view that the word "under" refers to "the way that a regulation is subordinate to its authorizing statute," that is the end of the matter – the regulation is authorized by

the wrong subchapter, and the requirements of § 1252(a)(2)(B)(ii) are not met. Amicus Br. 15, 17.

Amicus struggles to overcome this problem, constructing a complex multi-step argument whereby the regulation in question can somehow be linked up with a statutory provision in subchapter II that addresses motions to reopen – even though that statutory provision *did not even exist* at the time the regulation was promulgated. Amicus points out that the regulation referred to a now-repealed section of the INA that briefly mentioned a kind of motion to reopen that is not at issue in the instant case – a motion to reopen a removal order entered *in absentia*. And while Amicus also readily admits that "prior to IIRIRA, no statutory provision governed" reopening of the kind that Petitioner sought, Amicus Br. 44 (internal quotation marks omitted), Amicus also appears to find it sufficient that – after the regulation was put into place – the 1996 statute mentioned both kinds of motions to reopen, and did so in Subchapter II.

This reasoning cannot carry the day. A mere mention of a particular subject in subchapter II is not enough to make any regulation that also touches on that subject a regulation "under" that subchapter – and Amicus's own proffered definitions of the word "under" are not capacious enough to encompass such an approach. And Congress could not have intended for courts to have to trace the subject of a regulation through various repealed and newly enacted statutes in order to come to a conclusion about whether the regulation was "under" the proper part of the statute. These problems with Amicus's argument

strongly indicate that "under" does not have the meaning that Amicus suggests. But if "specified under this subchapter" can sweep in regulations at all, the inquiry surely must be confined to identifying which statutory provision actually authorizes the executive to issue the pertinent regulation. Amicus has identified no authorization for 8 C.F.R. § 1003.2 in Subchapter II. Accordingly, the Seventh Circuit would have jurisdiction to hear Petitioner's appeal even if this Court accepts Amicus's interpretation of § 1252(a)(2)(B)(ii).

## CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Seventh Circuit.

Respectfully submitted,

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# REPLY BRIEF

(B)

No. 08-911

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# In the Supreme Court of the United States

AGRON KUCANA, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

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# In the Supreme Court of the United States

No. 08-911

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE RESPONDENT SUPPORTING PETITIONER

The provision of the Immigration and Nationality Act (INA) at issue, 8 U.S.C. 1252(a)(2)(B)(ii), provides that "no court shall have jurisdiction to review" any decision "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." That provision precludes jurisdiction only when Congress itself has specified discretionary authority in the text of the relevant subchapter of the INA.

The court-appointed amicus (amicus) contends that the single word "under" in the statutory text unambiguously evidences a congressional intent to preclude jurisdiction when discretionary authority is specified only in a regulation, as well as when it is specified in the statute. That is wrong. The word "under" has multiple meanings, and in the context of Section 1252(a)(2)(B)(ii),

it means "in" or "by," so that the requisite discretionary authority must be contained within Subchapter II of Chapter 12 of Title 8 of the United States Code. Interpreting "under this subchapter" to include "in regulations adopted under this subchapter" would strain the statutory text, conflict with the way Congress ordinarily refers to regulations, and create a number of superfluities and anomalies.

Section 1252(a)(2)(B)(ii)'s context confirms that it ousts the courts of jurisdiction only when discretionary authority is specified in the text of the relevant subchapter. Section 1252 comprehensively regulates judicial review of removal, and paragraphs (A) through (C) of Section 1252(a)(2) list three categories of determinations that courts have no jurisdiction to review. Each of those categories relies upon other statutory provisions to define its scope; none relies upon regulations. Moreover, clause (i) of Section 1252(a)(2)(B) lists a variety of decisions that are specified as discretionary under particular identified sections of the relevant subchapter, and clause (ii) follows with a catch-all for "any other" decision for which discretionary authority is specified under the subchapter. Clause (ii), like clause (i), therefore applies only when discretionary authority has been specified by statute. Amicus entirely ignores this statutory context.

Amicus's view also cannot be squared with the drafting history of the statutory provision at issue and the federal courts' long history of reviewing denials of motions to reopen. At the time Congress enacted Section 1252(a)(2)(B)(ii), it also codified procedures and requirements for motions to reopen, borrowing from the Attorney General's reopening regulations. Yet Congress did not enact the portion of the regulations specifying that

reopening is discretionary, and it did not mention motions to reopen or regulations concerning these motions (or indeed regulations at all) in describing matters exempt from judicial review. The legislative record thus indicates that Congress intended to continue the federal courts' longstanding practice of reviewing denials of motions to reopen. Amicus suggests to the contrary based on Congress's general purpose to expedite removal of illegal aliens. But Congress furthered that purpose by enacting certain filing requirements for motions to reopen, not by altering the courts' jurisdiction over them.

Section 1252(a)(2)(B)(ii) therefore only precludes jurisdiction when Congress itself has committed a matter to the Attorney General's or the Secretary's discretion. Because motions to reopen are committed to the Board's discretion by regulation, rather than by statute, Section 1252(a)(2)(B)(ii) does not apply to them.

### A. The Text Of Section 1252(a)(2)(B)(ii) Bars Jurisdiction Only When Discretionary Authority Is Conferred By Statute, Not When It Is Conferred By Regulation

1. Amicus contends that, by using the word "under," Congress "unambiguously" extended Section 1252(a)(2)(B)(ii) to include regulations that specify a decision as discretionary. Amicus Br. 10, 14, 54. She is mistaken. The text says nothing about regulations; it points to "this subchapter" as the place that discretionary authority must be specified. Most naturally read, the phrase "the authority for which is specified under this subchapter" refers only to instances in which the requisite authority has been specified in the text of the subchapter.

As this Court has recognized, "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991). Amicus acknowledges as much. See Amicus Br. 17 (quoting *Ardestani*). In Section 1252(a)(2)(B)(ii), "specified under" means "specified in" or "specified by," so that courts lack jurisdiction only when discretionary authority for a certain decision or action is contained in the text of the relevant subchapter. Many dictionaries include such a definition of "under." For example, *Webster's Third New International Dictionary of the English Language* (1993) defines "under" as, *inter alia*, "within the grouping or designation of" or "in the section designated as," giving as an example "matters that come [under] this head[ing]," *id.* at 2487 (defs. 11a and b). It also defines "under" to mean "required by," "in accordance with," or "bound by," giving as an example "rights [under] the law." *Ibid.* (def. 8a). The *Oxford English Dictionary* likewise states that one meaning of "under" is "that one thing is covered by, or included in, another," such as when "under" "[d]enot[es] inclusion in a group [or] category" or "[d]enot[es] occurrence in a particular section or article of a literary work." 18 *Oxford English Dictionary* 950 (2d ed. 1989) (defs. 17a and b). Other dictionaries, including those relied upon by amicus, include similar definitions of "under."[1]

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[1] See, *e.g.*, *American Heritage College Dictionary* 1494 (4th ed. 2007) ("under" means "[w]ithin the group or classification of: *listed under biology*"); *Cambridge Dictionary of American English* 951 (2d ed. 2008) ("according to"; "*Under current law*"; "'*Where can I find books on swimming?*' '*Look under sports* (=within the subject of sports).'"); *New Oxford American Dictionary* 1830 (2d ed. 2005) ("under" is "used to express grouping or classification: *file it under 'lost'*"); *Random House Webster's Unabridged Dictionary* 2059 (2d ed. 2001) ("under"

The word "under" is commonly used in this manner. For example, if one spoke of rights "created under" the Constitution, that phrase naturally would be understood to refer only to rights provided in or by the Constitution, and not also to rights Congress has created by statute, even though the Constitution grants Congress the authority to enact statutes that confer rights. Similarly, if a tenant or landlord referred to rights or obligations "under the lease," that term naturally would signify only those obligations set forth in the lease. See also, *e.g.*, Bryan A. Garner, *A Dictionary of Modern Legal Usage* 896 (2d ed. 1995) (Garner) (giving as an example "*Under* Rule 32(a)(2), the deposition testimony may be used by an adverse party for any purpose at trial.").

Similarly to these examples, Section 1252(a)(2)(B)(ii) speaks of the specification of something (discretionary authority) "under" (meaning in or by) a particular legal text or document ("this subchapter"). "Under" that phrase, only the discretionary authority specified in the subchapter itself, not any discretionary authority specified in regulations, precludes judicial review.

2. Amicus offers two different definitions of "under" in support of her contention that Section 1252(a)(2)(B)(ii) applies to regulatory specifications of discretionary authority. She first suggests that "under" means "subordinate to," and Section 1252(a)(2)(B)(ii) therefore refers to regulations because "a regulation is subordinate to a statute." Br. 15 (citing 3 Francis Rawle, *Bouvier's Law Dictionary and Concise Encyclopedia* 3351 (reprint 8th ed. 1984 (1914)). But that defini-

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means "beneath the heading or within the category of: *Classify the books under 'Fiction' and 'General'*").

tion does not make sense in the context of Section 1252(a)(2)(B)(ii), because the text does not compare the relative strength or authority of two things. See *Webster's Third New International Dictionary of the English Language* 2277 (defining "subordinate" as "placed in a lower order, class, or rank" or "holding a lower or inferior position"). Instead, it speaks of where a specification of discretionary authority is found. If the term "subordinate to" is substituted for the word "under," the statute would read: a "decision or action * * * the authority for which is specified *subordinate to* this subchapter." The nonsense of that formulation indicates the fallacy of amicus's definition.

Amicus relatedly contends (Br. 17) that "under" means "pursuant to," and that "specified under this subchapter" therefore means specified in the statute or in regulations promulgated pursuant to it. But defining "under" as "pursuant to" does not solve amicus's problem. Substituting "pursuant to" for "under" would result in the formulation "the authority for which is specified pursuant to this subchapter." That awkward formulation is not unambiguous, because "pursuant to" has multiple meanings, see, *e.g.*, Garner 721, and the provision still mentions only one place—"this subchapter"—to look for a specification of discretionary authority. But if amicus were correct that "under" means "pursuant to," and "pursuant to" means "under the authority of" (see Amicus Br. 17), a fatal anomaly would arise: Section 1252(a)(2)(B)(ii) would apply only to regulations promulgated "under the authority of" the relevant subchapter, and not to specifications of discretion in the subchapter itself. That result would make Section 1252(a)(2)(B)(ii) inapplicable to the dozens of provisions in the relevant subchapter that specify dis-

cretionary authority. Gov't Br. 20 nn.11-12. And that result is difficult to reconcile with the provision's reference to the "authority" of the Attorney General, because although statutes typically would be thought to confer such authority, regulations that the Attorney General himself issues would not.

Amicus contends (Br. 15) that "'under' is the common way to express the relationship of a regulation to its authorizing statute." That is true, but also beside the point, because Section 1252(a)(2)(B)(ii) does not use the word "under" to "describe the relationship between regulations and the statutes under which they are promulgated," Amicus Br. 10 (internal quotation marks omitted), but rather to locate the specifications of discretionary authority that operate to preclude judicial review. Because the meaning of "under" depends on its context, *Ardestani*, 502 U.S. at 135, amicus's proffering of another meaning of the word in another context has no bearing on the definitional question presented here.

3. Congress's use of the word "under" in contexts similar to this one reinforces the most natural reading of the word in Section 1252(a)(2)(B)(ii). Congress often employs the word "under" to mean "within," "in," or "by" a certain statutory heading or subdivision. Congress for example has spoken of items specified "under"

a certain chapter,[2] subchapter,[3] section,[4] subsection,[5] paragraph,[6] subparagraph,[7] clause,[8] subclause,[9] and sentence.[10] Interpreting the unadorned word "under" to require the reader to look beyond the place Congress has specified in each of those provisions would create significant uncertainty about their reach and would run contrary to their plain import.[11]

4. As amicus's own examples demonstrate (Br. 15-16), when Congress means to refer to items specified

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[2] *E.g.*, 7 U.S.C. 1926(a)(18) ("the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this chapter").

[3] *E.g.*, 42 U.S.C. 1395w-2(a) ("conditions of participation or for coverage specified under this subchapter").

[4] *E.g.*, 6 U.S.C. 202(3) ("functions specified under section 251 of this title").

[5] *E.g.*, 2 U.S.C. 472(c) ("authorities specified under subsection (d) of this section").

[6] *E.g.*, 8 U.S.C. 1227(a)(1)(H)(i)(II) ("except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title").

[7] *E.g.*, 8 U.S.C. 1255a(g)(2)(C) ("waiver * * * of the periods specified under subparagraph (A)").

[8] *E.g.*, 5 U.S.C. 1214(b)(2)(A)(ii) ("the 240-day period specified under clause (i)").

[9] *E.g.*, 42 U.S.C. 1395ww(h)(7)(A)(ii)(III) ("the reference resident level specified under subclause (I) or (II)").

[10] *E.g.*, 8 U.S.C. 1153(b)(5)(C)(i) ("the dollar amount specified under the previous sentence").

[11] Congress also refers to matters specified "under" regulations when it means "in" or "by" regulations. See, *e.g.*, 8 U.S.C. 1101(a)(9) ("designated under regulations"); 8 U.S.C. 1182(a)(7)(A)(i)(I) ("if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title").

under a regulation, it does so expressly.[12] Significantly, every one of the examples amicus cites in her lengthy statutory appendix, from both the INA and other statutes, expressly mentions a "regulation" or "regulations" along with "under." See Amicus Br. App. A1-A26. By contrast, amicus has not identified any instance in which the word "under" itself has been taken to refer to regulations that are not specified in the statutory provision.

If amicus were correct that all Congress need do to signal the inclusion of regulations is to use the word "under," then much of the language in her statutory appendix would be superfluous. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). For example, Congress would not have had to say "designated under regulations prescribed under authority contained in this chapter" in 8 U.S.C. 1101(a)(9); it could have just said "des-

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[12] See, *e.g.*, 8 U.S.C. 1101(a)(9) ("designated under *regulations* prescribed under authority contained in this chapter") (emphasis added); 8 U.S.C. 1103(a)(4), (6) and (10) ("powers, privileges, or duties conferred or imposed by this chapter or *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1104(a) ("powers, functions, or duties conferred or imposed by this chapter or *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1182(a)(7)(A)(i)(I) ("if such document is required under the *regulations* issued by the Attorney General under section 1181(a) of this title") (emphasis added); 8 U.S.C. 1201(a)(1) ("limitations prescribed in this chapter or *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1201(g) ("provisions of this chapter, or the *regulations* issued thereunder") (emphasis added); 8 U.S.C. 1201 ("issue an immigrant visa * * * under *regulations* prescribed under this chapter") (emphasis added); 8 U.S.C. 1229a(b)(6)(A) ("[t]he Attorney General shall, by *regulation* * * * define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned") (emphasis added); 8 U.S.C. 1323(a)(1) ("if a visa was required under this chapter or *regulations* issued thereunder") (emphasis added).

ignated under authority contained in this chapter." See Amicus Br. App. A1-A26; see also, *e.g.*, 42 U.S.C. 1396t(e)(2)(A) ("specified under regulations under section 1396d(a)(23) of this title"); 42 U.S.C. 7411(g)(1) ("specify in regulations under subsection (f)(1) of this section").

Neither would Congress have written as it did a slew of statutory provisions that refer to a matter "under" or "specified under" a statutory section or subdivision and then refer separately to regulations involving that matter. For example, 8 U.S.C. 1153(b)(5)(C)(i) provides that "[t]he Attorney General * * * may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence." If "under" necessarily referred to regulations, then "the dollar amount specified under the previous sentence" would include any dollar amount specified under regulations, and Congress would not have needed to give the Attorney General the authority to "prescribe regulations increasing the dollar amount" from that listed in the statute. Similar examples appear throughout the United States Code.[13]

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[13] See, *e.g.*, 8 U.S.C. 1229c(e) ("[t]he Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens"); 26 U.S.C. 38(c)(5)(B) ("the $25,000 amount specified under subparagraph (B) of paragraph (1) shall be reduced for each component member of such group by apportioning $25,000 among the component members of such group in such manner as the Secretary shall by regulations prescribe"); 33 U.S.C. 1314(e) ("[t]he Administrator * * * may publish regulations, supplemental to any effluent limitations specified under subsections (b) and (c) of this section"); 42 U.S.C. 7509a(a)(1) ("the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision").

As all these statutory provisions indicate, if Congress had intended to make the availability of judicial review turn on regulations, it would have said that the courts lack jurisdiction to review any decision or action the discretionary authority for which is "specified under this subchapter or under regulations issued thereunder." Such a formulation in the alternative is common in the United States Code.[14] Yet Congress chose different language that does not mention regulations at all. "The statutory language is uncharacteristically pellucid on this score: it does not allude generally to 'discretionary authority.'" *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) (quoting 8 U.S.C. 1252(a)(2)(B)(ii)). It instead alludes specifically to authority "'*specified under this subchapter* to be in the discretion of the Attorney General.'" *Ibid.* (quoting 8 U.S.C. 1252(a)(2)(B)(ii)).[15]

5. Amicus erroneously suggests that various words other than "under" indicate that Section

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[14] See, *e.g.*, 8 U.S.C. 1103(a)(4), (6) and (10), 1104(a), 1201(a)(1) and (g), and 1323(a)(1) (text provided in note 12, *supra*); see also, *e.g.*, 2 U.S.C. 476(e)(1) ("the provisions of subchapter 1 of chapter 57 and section 5731 of Title 5, and regulations promulgated thereunder"); 12 U.S.C. 1426(a)(4)(A) ("this chapter and the regulations issued hereunder"); 17 U.S.C. 701(e) ("section 706(b) and the regulations issued thereunder").

[15] Although Section 1252(a)(2)(B)(ii) does not oust the courts of appeals of *jurisdiction* to review matters that are made discretionary by regulation, some decisions rendered under regulations that confer no private rights or are otherwise properly regarded as entirely discretionary would be judicially unreviewable because they are committed to agency discretion by law. See 5 U.S.C. 701(a)(2). That is true of the regulations providing for *sua sponte* reopening. See Gov't Br. 24 n.15. Nothing in Section 1252 displaces that general principle limiting judicial review of agency action.

1252(a)(2)(B)(ii) applies to regulations. First, contrary to amicus's contention (Br. 21-22), use of the word "any" in Section 1252(a)(2)(B)(ii) does not mean that the provision precludes judicial review of every discretionary decision of the Attorney General or the Secretary. That is because the remaining language in Section 1252(a)(2)(B)(ii) restricts the provision's scope to a subset of discretionary determinations—those for which authority "is specified under this subchapter." See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 836 n.4 (2008) ("other circumstances may counteract the effect of [the] expansive modifier[] ['any']"). Indeed, the logic of amicus's argument would preclude judicial review of *every* decision of the Attorney General or Secretary, discretionary or not. That is because the reference to "discretion," no less than the reference to "this subchapter," appears in the restrictive language following the phrase "any other decision or action." If amicus reads "any" essentially to negate that restrictive language, the result is to render non-reviewable all decisions of the Attorney General and the Secretary.

Second, amicus mistakenly contends (Br. 23) that Section 1252(a)(2)(B)(ii) covers discretion conferred by regulations because the jurisdictional bar applies "[n]otwithstanding any other provision of law (statutory or nonstatutory)." But that introductory clause does not define the scope of the jurisdictional bar; it states that, once the scope of the bar has been ascertained, jurisdiction is precluded regardless of what any other provision or source of law might say. This clause was added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(ii), 119 Stat. 310, to effect Congress's intention to "eliminate habeas review" of removal orders and instead permit "all aliens who are ordered removed

by an immigration judge" to "raise constitutional and legal challenges in the courts of appeals." H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 174-175 (2005). The "notwithstanding" clause codifies Congress's determination that no other provision of law, including habeas corpus, shall trump the jurisdictional bar; it says nothing about whether the bar encompasses decisions for which discretion is conferred by regulation.

Amicus also contends (Br. 23-24) that Section 1252(a)(2)(B)(ii)'s directive that the jurisdictional bar apply "regardless of whether the judgment, decision, or action is made in removal proceedings" means that actions made discretionary by regulation are covered. But again, the quoted language does not define the scope of the jurisdictional bar. It simply makes clear that a specified discretionary decision falls within the jurisdictional bar whether it is made by the Attorney General (in removal proceedings) or the Secretary (in petitions and applications for benefits outside such proceedings). The language (like the "notwithstanding" clause, discussed above) was added to Section 1252(a)(2)(B)(ii) by the REAL ID Act, see § 101(f)(2), 119 Stat. 305, in order to resolve disagreement in the circuits regarding whether Section 1252(a)(2)(B) applies to decisions made outside removal proceedings in contexts such as visa revocations, see, *e.g.*, *ANA Int'l Inc.* v. *Way*, 393 F.3d 886, 891 n.3 (9th Cir. 2004) (noting disagreement in circuits prior to the REAL ID Act). The language has nothing to do with the reach of the words "specified under this subchapter."

Finally, amicus suggests (Br. 20) that Congress intentionally "used the passive voice" in Section 1252(a)(2)(B)(ii) "to avoid identifying the entity doing the specifying." There is no reason to believe that is so.

Congress identified the entity that would be "doing the specifying"—itself—in a perfectly common way: by identifying the vehicle—"this subchapter"—through which the specification would be made. Both in the text of Section 1252(a)(2)(B)(ii) and in its surrounding context, in which all of the prohibitions on judicial review are defined by reference to statutes (Gov't Br. 26-30), Congress clearly identified the relevant lawmaking body.

6. Although Congress provided procedures and filing requirements for motions to reopen in 8 U.S.C. 1229a, it did not specify anywhere in the text of the relevant subchapter that the Attorney General's authority to adjudicate motions to reopen is discretionary in nature. Gov't Br. 18-21; see Pet. App. 7a. Amicus suggests in a footnote (Br. 18 n.8) that Section 1229a(c)(7)(B)'s statement that "[t]he motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted" confers discretionary authority by implying that the motion to reopen could be denied. That suggestion is without merit. Section 1229a(c)(7)(B) does not address conditions under which a motion to reopen may be granted; it instead lists the required contents of a motion to reopen. Although the statutory text implies that a motion to reopen may or may not be granted (a proposition that is hardly surprising), the provision does not state (or indeed even suggest) that the Attorney General's reopening authority is discretionary in nature.[13] Indeed, the

[13] Amicus mistakenly suggests (Br. 19 n.8) as support for her interpretation of 8 U.S.C. 1229a(c)(7)(B) that Section 1252(a)(2)(B)(ii) itself identifies a provision that provides discretionary authority without using words connoting discretion. Section 1252(a)(2)(B)(ii), on her argument, exempts from its reach "the granting of relief under section

text of Section 1229a(c)(7)(B) stands in stark contrast to the many provisions within the relevant subchapter that specify discretionary authority by using the word "discretion" or functionally equivalent words. See Gov't Br. 19-20 & nn.11-12.

7. In sum, amicus's view would expand the scope of Section 1252(a)(2)(B)(ii) beyond Congress's precise specification of the decisions it wished to remove from the courts' jurisdiction to review. Although the relevant text applies only where discretionary authority has been "specified under this subchapter," amicus's extension of this language to regulations would oust the courts of

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1158(a) of this title," and 8 U.S.C. 1158(a) "nowhere explicitly states that the decision to grant asylum is discretionary." Amicus Br. 19 n.8. Section 1158(a) provides that an alien "may apply" for asylum, and Section 1158(b) sets out the conditions under which asylum may be granted. The permissive text of Section 1158(b) makes clear that the decision whether to grant relief is entrusted to the Attorney General's or Secretary's discretion. See 8 U.S.C. 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum * * * if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C.] 1101(a)(42)(A).") (emphasis added). The reference in Section 1252(a)(2)(B)(ii) to subsection (a) of Section 1158—as opposed to subsection (b)—may be imprecise, but its import is clear. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Section 1158(a) provided that eligible aliens "may be granted asylum in the discretion of the Attorney General." 8 U.S.C. 1158(a) (1994). In IIRIRA, Congress divided former Section 1158(a) into several new subsections, see IIRIRA § 604(a), 110 Stat. 3009-690, but apparently failed to take account of that change when it referred to Section 1158(a) in Section 1252(a)(2)(B)(ii). In any event, comparing Section 1229a to Section 1158 makes clear that asylum and motions to reopen should not be treated the same, because asylum decisions are specified as discretionary "under this subchapter" (*i.e.*, in Section 1158(b)), and decisions on motions to reopen are not.

jurisdiction with respect to a potentially much broader class of discretionary decisions. That is exactly the wrong approach. A jurisdictional statute such as Section 1252(a)(2)(B)(ii) "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 212 (1968). Amicus's reading fails to do so.

**B. The Statutory Context Confirms That Section 1252(a)(2)(B)(ii) Does Not Apply To Denials Of Motions To Reopen**

1. Amicus ignores the context in which the provision at issue here appears. As the government has explained (Br. 26-30), Section 1252 comprehensively regulates judicial review of removal orders. Section 1252(a)(1) states that an alien may seek review of a final order of removal by filing a petition for review in the appropriate court of appeals. 8 U.S.C. 1252(a)(1). Section 1252(a)(2), entitled "Matters not subject to judicial review," then lists three categories of agency determinations over which the courts do not have jurisdiction: determinations regarding admissibility of aliens, see 8 U.S.C. 1252(a)(2)(A); denials of certain forms of discretionary relief, 8 U.S.C. 1252(a)(2)(B); and final removal orders of criminal aliens, 8 U.S.C. 1252(a)(2)(C).

Within each of those categories, Congress has defined the scope of the jurisdictional bar solely by reference to other statutory provisions. Section 1252(a)(2)(A), for example, defines its scope by reference to provisions in 8 U.S.C. 1225 that identify various determinations made by immigration officers in inspecting aliens for admission. Similarly, Section 1252(a)(2)(C) limits judicial review by reference to other portions of the INA that make aliens who have commit-

ted certain criminal offenses removable. Neither of those jurisdictional bars suggests that the availability of judicial review hinges in any way on regulations.

Section 1252(a)(2)(B) is triggered in the same manner. It contains two clauses, each of which bars review of decisions of the Attorney General or Secretary that are specified as discretionary in Subchapter II of Chapter 12 of Title 8. Clause (i) accomplishes this purpose by explicitly listing a number of decisions entrusted to the Attorney General's or Secretary's discretion by statute: "judgment[s] regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255." 8 U.S.C. 1252(a)(2)(B)(i). Clause (ii), which is at issue here, then provides a catch-all provision for "any other decision or action" of the Attorney General or Secretary "the authority for which is specified under this subchapter to be in [their] discretion." 8 U.S.C. 1252(a)(2)(B)(ii). Read in tandem, the two provisions make clear that Congress intended to limit judicial review only where Congress itself has provided that the Attorney General's or the Secretary's authority is discretionary. See Gov't Br. 27-28. Indeed, both refer to matters "under" the relevant subchapter or specified section within it, and the word "other" in clause (ii) reinforces the conclusion that both clauses pertain to the same kinds of specifications of discretionary authority—specifications in the text of the relevant subchapter. The provisions immediately surrounding the text at issue therefore strongly support its limitation to discretionary authority specified in the relevant subchapter.

2. Another provision in Section 1252, Section 1252(b)(6), confirms that denials of motions to reopen are judicially reviewable. Section 1252(b)(6) requires a court of appeals to consolidate a petition for review of

a denial of reopening with a petition for review of the underlying removal order. 8 U.S.C. 1252(b)(6). There would have been no need to provide for consolidation if the denial of a motion to reopen were not reviewable at all. Indeed, a predecessor to Section 1252(b)(6) was enacted six years prior to the enactment of IIRIRA in 1996. See *Stone* v. *INS*, 514 U.S. 386, 394 (1995); Gov't Br. 30. But rather than deleting that provision when it revised the INA's judicial review section and enacted Section 1252(a)(2)(B)(ii) as part of IIRIRA, as would have been appropriate to conform to amicus's view, Congress reenacted the consolidation provision in Section 1252(b)(6).

Amicus suggests (Br. 29 n.10) two ways to reconcile Section 1252(b)(6) with her view of Section 1252(a)(2)(B)(ii), but neither survives scrutiny. First, amicus argues that although Section 1252(a)(2)(B)(ii) generally would bar review of denials of motions to reopen, Section 1252(a)(2)(D) would permit review of constitutional claims and questions of law. But Section 1252(a)(2)(D) was not enacted until 2005, which means that under amicus's view Section 1252(b)(6) would have had no purpose or effect between 1996 and 2005. See Gov't Br. 31. Second, amicus hypothesizes that Congress wanted to "leave room for the Attorney General to amend the relevant regulations and disclaim unreviewable discretion." Amicus Br. 30 n.10. That assertion has no support in the statutory text or the legislative record, and it is contrary to the purpose amicus elsewhere has ascribed to Congress, which is to preclude judicial review of denials of reopening in order to speed removal of aliens.

### C. The History Of The Immigration Laws Confirms That Congress Did Not Intend Section 1252(a)(2)(B)(ii) To Apply To Denials Of Motions To Reopen

1. The federal courts have long reviewed denials of motions to reopen. That unbroken practice dates back to the beginning of the last century[17] and was recognized in this Court's recent decision in *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008). In light of that long history of judicial review, Congress would have spoken clearly if it had intended to strip the courts of appeals of their jurisdiction to review denials of motions to reopen. It did not do so.

Amicus contends (Br. 34) that the history supports her view because it shows that reopening has long been entrusted to the Board's discretion. Here, amicus conflates the standard of review with the availability of review. That denials of reopening have long been subject to highly deferential review (Gov't Br. 35 n.18) does not mean that Congress in 1996 intended to cut off judicial review of those decisions entirely. Indeed, it tends to suggest the opposite: Congress knew about this long-

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[17] See, *e.g.*, *INS* v. *Doherty*, 502 U.S. 314 (1992); *INS* v. *Abudu*, 485 U.S. 94 (1988); *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981); *Al-Karoghali* v. *INS*, 409 U.S. 1086 (1972) (Douglas, J., dissenting from denial of certiorari); *Grace* v. *Rosenberg*, 379 U.S. 18 (1964); *Groza* v. *INS*, 30 F.3d 814 (7th Cir. 1994); *Gomez-Gomez* v. *INS*, 681 F.2d 1347 (11th Cir. 1982); *Ghosh* v. *Attorney Gen.*, 629 F.2d 987 (4th Cir. 1980); *Au Yi Lau* v *United States INS*, 555 F.2d 1036 (D.C. Cir. 1977); *Vergel* v. *INS*, 536 F.2d 755 (8th Cir. 1976); *Bufalino* v. *INS*, 473 F.2d 728 (3d Cir. 1973); *Gena* v. *INS*, 424 F.2d 227 (5th Cir. 1970); *La Franca* v. *INS*, 413 F.2d 686 (2d Cir. 1969); *Williams* v. *Sahli*, 271 F.2d 228 (6th Cir. 1959); *Chew Hay Quong* v. *White*, 244 F. 749 (9th Cir. 1917); *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916).

standing practice, including the narrow review allowed, and decided not to change it.

2. The statute's drafting history confirms that conclusion. The Attorney General long has provided for reopening by regulation. See Gov't Br. 32-33. In 1990, Congress instructed the Attorney General to revise the regulations to place time and numerical limitations upon motions to reopen. See Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 545(d), 104 Stat. 5066. The Attorney General amended the regulations to add those limitations and also added a provision stating that motions to reopen are committed to the Board's discretion. See 61 Fed. Reg. 18,904-18,905 (1996) (8 C.F.R. 3.2 (1997)) (current version at 8 C.F.R. 1003.2). Congress enacted IIRIRA against that backdrop. In doing so, Congress for the first time expressly provided that aliens may file a motion to reopen and borrowed several provisions from the Attorney General's regulations to govern such filings. But Congress made no effort to preclude review of denials of reopening. Congress could have done so in a number of ways: by mentioning denials of reopening in Section 1252(a)(2)(B); by making Section 1252(a)(2)(B)(ii) turn on regulatory, as well as statutory, specifications of discretion; or by enacting in the INA the language in the Attorney General's preexisting regulations committing reopening to the Board's discretion. See Gov't Br. 34-35. Congress did not take any of these steps.

3. Amicus contends (Br. 28-31) that Congress wished to expedite the removal of aliens not only by placing time and numerical limitations on motions to reopen but also by precluding all judicial review of reopening.

IIRIRA's general purpose was undoubtedly to expedite the removal of illegal aliens from the United States. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 475 (1999). The relevant inquiry, however, is not whether amicus's view would "serve the general purposes of" IIRIRA, but "how far Congress meant to go when it enacted" Section 1252(a)(2)(B)(ii). *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 100 (2006). There is no evidence that Congress sought to accomplish its general purpose by removing all jurisdiction to review denials of motions to reopen. To the contrary, the legislative record in both 1990 and 1996 reveals that Congress's concern was that aliens were filing too many motions to reopen too long after their original removal orders, not that aliens were too often obtaining judicial review of the denials of such motions. See IMMACT § 545(d), 104 Stat. 5066; 61 Fed. Reg. at 18,901; IIRIRA § 304(a)(3); 110 Stat. 3009-593; H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 212 (1996) (*Conference Report*). And Congress's reenactment of Section 1252(b)(6) belies amicus's suggestion that IIRIRA was designed to expedite removal at all costs.

Amicus cites two items (Br. 31-33) in support of her view. The first is the statement in a conference report that Section 1252(a) "bars judicial review * * * of any decision or action of the Attorney General which is specified to be in the discretion of the Attorney General (except a discretionary judgment whether to grant asylum as described in section 242(b))." *Conference Report* 219. That statement simply summarizes the statutory text at a general level, and does not purport to answer the question whether decisions made discretionary by regulation are judicially reviewable.

Amicus's second source is a snippet in a law review article published after IIRIRA's passage, which states that "issues pertaining to purely discretionary relief, including cancellation of removal and voluntary departure, * * * are within the sole discretion of the Attorney General and, thus, are no longer appealable to the federal courts." Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L.J. 883, 918-919 (1997). A statement in a law review article published after a statute was enacted does not reflect a shared understanding of the Members of Congress who deliberated on the statute. See, *e.g.*, *CSPC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). In any event, the cited language does not address whether Section 1252(a)(2)(B)(ii) extends to regulations; it appears to concern only Section 1252(a)(2)(B)(i), because it uses the language of that provision (discretionary "relief") and refers to two statutory examples contained in that provision (cancellation of removal and voluntary departure). Amicus therefore has not identified any basis in the legislative record sufficient to override the clear statutory text, context, and history.

4. The text of the judicial review bars reveals Congress's true design. In subparagraphs (A), (B), and (C) of Section 1252, Congress carefully delineated the decisions that it wished to insulate from judicial review. In defining the bars to judicial review in Section 1252(a)(2) by reference to other provisions in the INA, Congress ensured that it, and only it, would limit the federal courts' jurisdiction to review removal orders. That decision accords with Congress's traditional role in shaping the federal courts' jurisdiction, see, *e.g.*, *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922), and it leaves untouched the federal courts' longstanding practice of re-

viewing denials of motions to reopen under a highly deferential standard, see, *e.g.*, *Dada*, 128 S. Ct. at 2315. Under those circumstances, there is no reason to strain the statutory text to preclude jurisdiction to review denials of motions to reopen.[18]

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[18] Amici Washington Legal Foundation et al suggest (Br. 7-16) that the judgment should be affirmed because petitioner's second motion to reopen was barred by 8 U.S.C. 1229a(c)(7)(A). That argument was not presented to or passed on by the court of appeals, and it has not been advanced by any party or by the court-appointed amicus. This Court therefore should decline to consider it. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 738-739 (1998), *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

In any event, amici are mistaken. Although Section 1229a(c)(7)(A) states that "[a]n alien may file one motion to reopen proceedings under this section," the Attorney General long has interpreted that provision to permit a second motion to reopen to seek asylum or withholding of removal based on changed conditions in the country of removal. See 8 C.F.R. 1003.2(c)(3)(ii). That regulation reasonably interprets the statutory text. The statutory assurance that an alien "may file one motion to reopen" does not foreclose the Attorney General from interpreting Section 1229a to permit a further motion in certain special circumstances. See *Dada*, 128 S. Ct. at 2316 ("the statutory text * * * guarantees to each alien the right to file 'one motion to reopen proceedings'"). And other provisions of the INA suggest that a further motion to reopen should be permitted in the circumstances allowed by the regulation. See 8 U.S.C. 1158(a)(2)(D) (authorizing an exception for changed circumstances to the prohibition against filing successive asylum applications); 8 U.S.C. 1229a(c)(7)(C)(ii) (waiver of the time limitations for a motion to reopen based on changed circumstances material to an asylum claim). Finally, given that the relevant regulations existed prior to Section 1229a's enactment, see 61 Fed. Reg. at 18,904, Congress's failure to restrict the Attorney General's discretion to allow an additional motion to reopen based on changed country conditions is telling. There is no basis to overturn the Attorney General's regulation.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
*Solicitor General*

NOVEMBER 2009

# AMICUS CURIAE BRIEF

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No. 08-911

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IN THE

# Supreme Court of the United States

AGRON KUCANA,

*Petitioner,*

—v.—

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The ACLU was counsel in *INS v. St. Cyr*, 533 U.S. 289 (2001), and has substantial experience litigating jurisdictional issues in the immigration area, regularly appearing before this Court and the courts of appeals on these issues. More generally, the Immigrants' Rights Project of the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit held that it lacked jurisdiction to review Kucana's motion to reopen on the basis of three conclusions. First, it held that 8 U.S.C. 1252(a)(2)(B)(ii) divested it of jurisdiction to review motions to reopen, notwithstanding the fact that the discretion-conferring language governing

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to this brief's preparation or submission.

reopening motions is specified solely in regulations, rather than in the Immigration and Nationality Act (INA).[2] Second, it held that Section 1252(a)(2)(B)(ii) barred review of petitioner's particular claims despite the fact that the Board of Immigration Appeals (BIA or Board) denied Kucana's motion on non-discretionary grounds (*i.e.*, that Kucana had not made out a *prima facie* case for reopening his asylum application). Finally, it held that 8 U.S.C. 1252(a)(2)(D) did not restore its jurisdiction because Kucana was not raising "constitutional claims" or

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[2] Section 1252(a)(2)(B) is entitled "Denials of discretionary relief" and provides in full:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> > (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
> >
> > (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

"questions of law." *See Kucana v. Mukasey*, 533 F.3d 534, 536-38 (7th Cir. 2008).

*Amicus* urges the Court to reverse the Seventh Circuit's erroneous ruling – and to do so narrowly, without addressing more significant jurisdictional questions that have not been raised by either petitioner or the government and are not squarely presented here. Indeed, both petitioner and the government press only a single ground for reversal – that motions to reopen are not covered by Section 1252(a)(2)(B)(ii) because the Attorney General's discretion is specified solely in the regulations, and not in the relevant "subchapter" of the INA. That argument is plainly correct, especially in light of Section 1252(a)(2)(B)(ii)'s unambiguous language and the fact that the Seventh Circuit's interpretation of Section 1252(a)(2)(B)(ii) would mean that the agency could insulate many of its decisions simply by enacting discretion-conferring regulations.

If the Court reverses the Seventh Circuit on this ground, as it can and should, it need not reach three additional issues:

1) First, the Court need not address the more far-reaching question of *what type* of language would fall within the scope of Section 1252(a)(2)(B)(ii) were it contained in the statute rather than the regulations. The INA contains provisions that expressly vest the Attorney General with "discretion" to make a decision and those provisions indisputably fall within Section 1252(a)(2)(B)(ii). But, as the government notes (Govt. Br. 20 & n.12), the Act also

contains provisions that contain less explicit language. As to these less explicit provisions, the courts of appeals are divided on whether the language is sufficient to vest the Attorney General with unreviewable discretion under Section 1252(a)(2)(B)(ii).

In this case, however, the Court need not resolve the issue because the relevant statutory provisions governing reopening motions contain no discretion-conferring language whatsoever, as the government correctly notes (Govt. Br. 20), and as even the Seventh Circuit acknowledged, 533 F.3d at 536. Instead, the Court should reserve the issue for a case where the relevant statutory provision contains language that at least arguably confers discretion and there is an actual controversy (and full briefing) on the issue.

Indeed, even if the Court were to accept the Seventh Circuit's position that Section 1252(a)(2)(B)(ii) applies where the discretion-conferring language appears solely in regulations, the Court would still not need to address what type of language is sufficient to confer unreviewable discretion on the Attorney General. Here, the relevant regulations explicitly grant the agency "discretion" to grant or deny a motion to reopen. As a result, there is no reason to address this issue, even if the Court holds that Section 1252(a)(2)(B)(ii) applies to motions to reopen.

2) Second, the Court need not decide whether Section 1252(a)(2)(B)(ii) bars review only where the

Attorney General's decision is actually based on an exercise of discretion, or instead, precludes review of *all* claims (factual, legal and discretionary) that in any way relate to a discretionary decision. The government implicitly assumes that Section 1252(a)(2)(B)(ii) bars review of all claims, and thus, if applicable to motions to reopen, would insulate such motions from all judicial scrutiny, including to correct factual and legal errors. *See* Govt. Br. at 30-31 (assuming that provisions generally providing for review of motions to reopen would have lacked any "purpose" if Section 1252(a)(2)(B)(ii) covered such motions); *see also* Pet. Br. at 28-33 and n.15. That is wrong.

Section 1252(a)(2)(B)(ii) bars review only where the Attorney General rules on discretionary grounds and the petitioner seeks review of that discretionary ruling. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (holding that Section 1252(a)(2)(B)(ii) did not bar review of a legal claim challenging a discretionary detention decision). Thus, even if Section 1252(a)(2)(B)(ii) did generally cover motions to reopen (which it does not because the discretion is conferred solely by regulation), Kucana's particular motion was reviewable because it was denied on non-discretionary grounds.

In any event, because neither petitioner nor the government advances this argument as an alternative ground for reversal, the Court need not directly address the precise scope of the jurisdiction stripping language in Section 1252(a)(2)(B)(ii). The

Court should also refrain from resting its decision on arguments that *implicitly* assume that Section 1252(a)(2)(B)(ii) bars review over all claims, and not just actual discretionary determinations.

In particular, the Court should not, and need not, adopt the position that the 1996 provisions spelling out the procedure for obtaining judicial review of motions to reopen (such as the consolidation provision) would be rendered superfluous if Section 1252(a)(2)(B)(ii) applied to motions to reopen. As petitioner acknowledges, Pet. Br. at 33 n.15, those provisions would only be rendered meaningless if Section 1252(a)(2)(B)(ii) bars review of all types of claims, rather than narrowing the scope of review to non-discretionary (factual and legal) claims. If, however, Section 1252(a)(2)(B)(ii) permits review of non-discretionary claims, then the provisions would have meaning: they would set forth the procedure for filing a petition for review from the denial of a motion to reopen and Section 1252(a)(2)(B)(ii) would then dictate the scope of that review.

There are ample indications that Congress did not intend for Section 1252(a)(2)(B)(ii) to apply to motions to reopen – including most importantly the unambiguous language of Section 1252(a)(2)(B)(ii) itself. Thus, the Court can hold that motions to reopen are not covered by Section 1252(a)(2)(B)(ii), without addressing, directly or indirectly, the scope of Section 1252(a)(2)(B)(ii)'s preclusion language or adopting the "superfluous" argument.

3) Finally, the Court need not address whether 8 U.S.C. 1252(a)(2)(D) provided the court of appeals with jurisdiction, since petitioner apparently did not argue below that he was raising "constitutional claims" or "questions of law" within the meaning of Section 1252(a)(2)(D), and neither petitioner nor the government argues in this Court that review of Kucana's motion to reopen is available under Section 1252(a)(2)(D). *See* Govt. Br. at 17-18 n.9 (noting that scope of Section 1252(a)(2)(D) is not presented here).

The scope of Section 1252(a)(2)(D)'s jurisdiction-restoring language – and in particular the meaning of the term "questions of law" – is the subject of extensive litigation and has given rise to several circuit splits. Among other questions, the courts of appeals have sharply differed on how to differentiate between an unreviewable factual claim and a reviewable mixed question of law and fact. Given the circuit conflicts, and the fact that no party is raising the issue, the Court should not address the scope of Section 1252(a)(2)(D). Nor should the Court characterize petitioner's claim as either factual or legal, since nothing turns on that characterization in this case.

## ARGUMENT

### I. SECTION 1252(a)(2)(B)(ii) DOES NOT APPLY TO MOTIONS TO REOPEN BECAUSE DISCRETION IS SPECIFIED SOLELY IN THE REGULATIONS.

As petitioner and the government have briefed at greater length, the jurisdictional bar in Section 1252(a)(2)(B)(ii) applies only where discretion is conferred by statute, rather than by regulations. The plain language of the jurisdiction-stripping provision makes clear that the agency's discretionary rulings are unreviewable only where the discretionary authority is "specified" in the relevant "subchapter" of the INA. The relevant "subchapter" is subchapter II of Chapter 12, 8 U.S.C. 1151-1381. Subchapter II, at 8 U.S.C. 1229a(c)(7), creates a statutory right to reopen and lays out the general rules governing such motions. It does not, however, specify that decisions on motions to reopen are in the discretion of the Attorney General.

The statutory silence is significant, since Sections 1151-1381 clearly specify many other discretionary powers of the Attorney General. *See, e.g.*, 8 U.S.C. 1157(c)(1) ("the Attorney General may, *in the Attorney General's discretion* and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country") (emphasis added).

Notably, although the Seventh Circuit reached a contrary conclusion, it did not identify any language in the statute that confers discretion on the Attorney General. Instead, it looked to the language of the regulations governing motions to reopen, which provide that "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board." 8 C.F.R. 1003.2(a). But,

under the plain language of Section 1252(a)(2)(B)(ii), the discretion must be specified in the statute.

Moreover, the Seventh Circuit's decision is not only inconsistent with Section 1252(a)(2)(B)(ii)'s plain language, but has the effect of permitting the agency charged with enforcing the immigration laws to determine which of its actions will be reviewable and which will not. Indeed, the jurisdiction of the courts of appeals would no longer be controlled by the statutory regime created by Congress, but rather by the agency whose actions are being reviewed. This result is inconsistent with the statute, longstanding practice, and the "strong presumption in favor of judicial review of administrative action." *See INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

Thus, as every other circuit to address the issue has concluded, motions to reopen are not covered by Section 1252(a)(2)(B)(ii).[3] To resolve this case, the Court need go no further than to hold that Section 1252(a)(2)(B)(ii) applies only where the

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[3] *See Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008); *Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2005) (per curiam); *Shardar v. Atty. Gen. of U.S.*, 503 F.3d 308, 311 (3d Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741, 744 (4th Cir. 2006); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Fang Huang v. Mukasey*, 523 F.3d 640, 654 (6th Cir. 2008); *Miah v. Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 529 (9th Cir. 2004); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361-62 (10th Cir. 2004); *Montano Cisneros v. U.S. Atty. Gen.*, 514 F.3d 1224, 1226 (11th Cir. 2008).

Attorney General's discretionary authority is specified by statute.

## II. THE COURT SHOULD NOT ADDRESS THREE JURISDICTIONAL ISSUES THAT HAVE NOT BEEN BRIEFED AND ARE NOT SQUARELY PRESENTED HERE.

### A. The Court Need Not Decide What Type of Statutory Language is Necessary to Confer Discretion Within The Meaning of Section 1252(a)(2)(B)(ii).

The Seventh Circuit recognized that the relevant statutory provisions governing motions to reopen contain *no* discretion-conferring language whatsoever. 533 F.3d at 536. *See* Govt. Br. at 20 (noting that the statute does not contain "any" discretion-conferring language). That is plainly correct. Thus, this case does not raise the question of what words – short of actually mentioning the term "discretion" – are sufficient to specify that a decision is discretionary within the meaning of Section 1252(a)(2)(B)(ii). Wherever the line is drawn, the statutory provisions governing motions to reopen would be insufficient.

Moreover, there is no question that the regulations *do* explicitly confer discretion: "[t]he decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board." 8 C.F.R. 1003.2(a). Thus, even if the Court were to

accept the Seventh Circuit's view that Section 1252(a)(2)(B)(ii) applies where the discretion-conferring language is contained solely in regulations, there would be no need to address whether language that does not explicitly mention the term "discretion" is sufficient to trigger Section 1252(a)(2)(B)(ii).

Reserving the issue is especially appropriate because the courts of appeals are divided on the question. For example, the courts are divided on whether they are precluded from reviewing the "particularly serious crime" determination governing eligibility for asylum and withholding of removal. *Compare, e.g.*, *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable under Section 1252(a)(2)(B)(ii), notwithstanding the fact that the statute does not explicitly mention the Attorney General's *discretion*), *with Alaka v. Atty. Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed); *Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

Similarly, the courts of appeals are divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is unreviewable notwithstanding the fact that the statute nowhere expressly refers to the Attorney General's "discretion." *Compare, e.g.*, *Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is

inherently discretionary and unreviewable because it requires "a judgment call"); *Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves "application of law to factual determinations").

The disagreement over what type of language confers discretion within the meaning of Section 1252(a)(2)(B)(ii) is also at issue in many other contexts, including whether an alien has met the "good faith" marriage requirement necessary for a hardship waiver,[4] and the decision to revoke a visa.[5] Because the Court's analysis of what language is sufficient to confer discretion for purposes of Section

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[4] *Compare Cho v. Gonzales*, 404 F.3d 96, 100-02 (1st Cir. 2005) (holding that the "good faith marriage" determination for a hardship waiver under Section 1186a(c)(4) is reviewable); *Ibrahimi v. Holder*, 566 F.3d 758, 763 (8th Cir. 2009) (same), *with Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 159-61 (3d Cir. 2004) (holding "good faith marriage" is discretionary and unreviewable); *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004) (same).

[5] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that the decision to revoke a visa is reviewable because there are non-discretionary standards for the courts to apply), *with Jilin Pharmaceutical USA, Inc. v. Chertoff*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the statute states that the Attorney General "may" revoke a visa "at any time" the decision is specified as discretionary in the statute and falls within Section 1252(a)(2)(B)(ii)); *El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (same).

1252(a)(2)(B)(ii) has potentially significant implications for these and other categories of cases, *amicus* urges the Court not to address the issue until it is squarely presented in an actual controversy and the parties have fully briefed the issue.

### B. The Court Need Not Address Whether Section 1252(a)(2)(B)(ii) Permits Review Over Non-Discretionary Claims.

After concluding (incorrectly) that Section 1252(a)(2)(B)(ii) applies to motions to reopen, the Seventh Circuit then held that Section 1252(a)(2)(B)(ii) divested it of jurisdiction over both discretionary and non-discretionary claims. Accordingly, it held that Section 1252(a)(2)(B)(ii) precluded review over Kucana's particular claims, which it acknowledged were non-discretionary. 533 F.3d at 537. That broad interpretation of Section 1252(a)(2)(B)(ii) is erroneous. However, the Court need not in this case address whether Section 1252(a)(2)(B)(ii) precludes review over non-discretionary claims because neither petitioner nor the government makes the argument that the Seventh Circuit could have reviewed Kucana's particular claims even if Section 1252(a)(2)(B)(ii) generally applied to motions to reopen. Furthermore, and importantly, the Court should not adopt the position that certain statutory provisions would be rendered superfluous if Section 1252(a)(2)(B)(ii) applied to reopening motions, because that argument implicitly assumes that

Section 1252(a)(2)(B)(ii) precludes review of *all* claims, factual, legal and discretionary.

1. Section 1252(a)(2)(B)(ii) applies only to *discretionary* determinations made by the agency, and not every claim related to a discretionary decision. Thus, even where a particular type of agency decision generally falls under Section 1252(a)(2)(B)(ii) (because the statute confers clear discretionary authority), the courts of appeals are not divested of jurisdiction in particular cases if the actual basis of the agency's decision is non-discretionary.

Here, the BIA did not deny Kucana's motion to reopen in the exercise of its discretion. Instead, it made a non-discretionary determination that Kucana had failed to demonstrate the requisite changed circumstances for reopening:

> Based on the evidence submitted, we are unable to find that the respondent established his prima facie eligibility for asylum or withholding of deportation based on material changes that have occurred in Albania since his failure to appear.

Pet. App. 25a. Nowhere in its decision did the BIA indicate that it was denying Kucana's motion to reopen as a matter of discretion. Thus, even if Section 1252(a)(2)(B)(ii) applies to motions to reopen, the Seventh Circuit erred in holding that it did not have jurisdiction over Kucana's claims.

The government's brief, however, implicitly assumes that Section 1252(a)(2)(B)(ii) applies to all claims related to a discretionary decision. The government notes that Congress in 1996 not only codified the right to file a motion to reopen, but also expressly provided procedures for obtaining judicial review of reopening motions. *See* Govt. Br. at 30-31 (citing 8 U.S.C. 1252(b)(6)). The government thus argues that Congress would have had no reason to spell out a procedure for judicial review of motions to reopen if Section 1252(a)(2)(B)(ii) was intended to cover such motions, since Section 1252(a)(2)(B)(ii) would have divested the courts of appeals of all review over reopening motions. *See* Govt. Br. at 31; *see also* Pet. Br. at 28-33 (making same argument); *but see id.* at 33 n.15.

But that is only true if (as petitioner notes, Pet. Br. at 33 n.15) Section 1252(a)(2)(B)(ii) divested the courts of appeals of all review over motions to reopen, regardless of the basis for the denial of the motion. The provisions would not be rendered superfluous if (as *amicus* contends) Section 1252(a)(2)(B)(ii) covers only those denials that are actually based on the exercise of discretion, since that would leave the courts with jurisdiction to review motions to reopen that were denied on the basis of legal or factual determinations (as in this case).[6]

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[6] Petitioner makes the same superfluous argument, Pet. Br. at 28-33, but acknowledges that the superfluous argument only has force if Section 1252(a)(2)(B)(ii) precludes review of all

Notably, the position taken by the government in this Court is directly at odds with the position it took in the Seventh Circuit. There, the government advanced two arguments. It argued, as it does here, that motions to reopen are generally not covered by Section 1252(a)(2)(B)(ii) because the discretion-conferring language is contained solely in regulations. But, significantly, it also argued that Kucana's motion would have been reviewable in any event, because it was denied on non-discretionary grounds. Indeed, as the Seventh Circuit noted, the latter argument was the government's principal contention in the court of appeals. 533 F.3d at 537. Yet now the government appears to be suggesting that Section 1252(a)(2)(B)(ii), where applicable, bars review over all types of claims.

The government's position in the Seventh Circuit was the correct one. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that Section 1252(a)(2)(B)(ii) does not bar jurisdiction over a statutory claim related to the Attorney General's discretionary detention authority. The Court explained that the aliens in *Zadvydas* do not

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claims, discretionary or non-discretionary. *See id.* at 33 n.15; *see also id.* (acknowledging authority contrary to the position that Section 1252(a)(2)(B)(ii) precludes review of all claims, discretionary and non-discretionary); *see infra* at 16-17 and n.7 (discussing that courts of appeals have overwhelmingly held that Section 1252(a)(2)(B)(ii) precludes review only of discretionary determinations).

> seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion.

533 U.S. at 688. This Court thus made clear that the proper focus under Section 1252(a)(2)(B)(ii) is on the particular claim asserted by the petitioner, not whether the claim is related to a decision that is ultimately in the discretion of the Attorney General. *See also St. Cyr*, 533 U.S. at 307-08.

The courts of appeals have also overwhelmingly held that Section 1252(a)(2)(B) bars review only where the alien is challenging a discretionary determination, and does not bar review of factual or legal claims. *See, e.g., Singh v. Gonzales*, 413 F.3d 156, 160 n.4 (1st Cir. 2005) (reviewing a non-discretionary determination related to a discretionary decision covered by 1252(a)(2)(B)); *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir. 2005) (same); *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (same); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 215-16 (5th Cir. 2003) (same); *Garcia-Melendez v. Ashcroft*, 351 F.3d 657, 661 (5th Cir. 2003) (same); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005) (same); *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 502-03 (6th Cir. 2008) (same); *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005) (same); *Gutierrez v. Mukasey*, 521

F.3d 1114, 1116 (9th Cir. 2008) (same); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140-41 (9th Cir. 2002) (same); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157-58 (9th Cir. 2005) (same); *Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1147-49 (10th Cir. 2005) (same).[7]

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[7] With the exception of the Seventh Circuit, *amicus* is not aware of any case, before or after the 2005 enactment of 8 U.S.C. 1252(a)(2)(D), holding that non-discretionary legal claims are barred by Section 1252(a)(2)(B). Equally as significant, *amicus* is also not aware of any decision issued before the enactment of Section 1252(a)(2)(D), outside the Seventh Circuit, that held that Section 1252(a)(2)(B) barred review of non-discretionary factual claims. Insofar as there are a handful of post-2005 cases suggesting that non-discretionary factual claims are barred by Section 1252(a)(2)(B), those cases are almost all dicta, devoid of any analysis, and frequently inconsistent with precedent within the same circuit.

Among other things, the cases do not even attempt to explain the textual basis in Section 1252(a)(2)(B) for distinguishing between legal claims, on the one hand, and factual and discretionary claims, on the other (as opposed to drawing a line between discretionary and non-discretionary claims). Indeed, these cases simply assume that with the enactment of Section 1252(a)(2)(D), they can no longer review non-discretionary factual claims. *See, e.g., Andrada v. Gonzales*, 459 F.3d 538, 542 (5th Cir. 2006) (stating without analysis that the courts of appeals "continue" not to have jurisdiction over factual claims, citing Section 1252(a)(2)(D), and not acknowledging its own pre-2005 case law finding review under Section 1252(a)(2)(B) of non-discretionary factual claims, such as *Garcia-Melendez*, 351 F.3d at 651); *Arambula-Medina v. Holder*, --- F.3d ---, No. 08-9589, 2009 WL 1978726 at *2 (10th Cir. July 10, 2009) (stating that it may not review factual claims under Section 1252(a)(2)(B), but erroneously relying on a prior decision involving a complete jurisdictional

Focusing on the specific claim raised by the petitioner is also consistent with the approach taken under analogous jurisdictional provisions, such as 5 U.S.C. 701(a)(2) of the Administrative Procedure Act. That provision bars review where "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). This Court and the lower courts have nonetheless found jurisdiction where the precise claim asserted is non-discretionary, even if it relates to an otherwise unreviewable discretionary action. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (finding jurisdiction to review constitutional claim notwithstanding conclusion that the CIA Director's ultimate decision to discharge the employee was discretionary and unreviewable under APA Section 701(a)(2)); *Ward v. Skinner*, 943 F.2d 157, 159-60 (1st Cir. 1991) (Breyer, C.J.) (finding jurisdiction over statutory challenge to an otherwise discretionary denial of request to waive certain transportation safety rules).

In short, focusing on the particular *claim* raised by the petitioner, and not on whether the

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bar precluding "review [of] any determination"). *Cf. Suvorov v. Gonzales*, 441 F.3d 618, 622 (8th Cir. 2006) (finding no review of factual claims in a case involving both Section 1252(a)(2)(B) and a separate jurisdictional bar specifically governing factual claims). But that position wrongly assumes that Section 1252(a)(2)(D) narrowed the scope of review under Section 1252(a)(2)(B). It is indisputable, however, that Section 1252(a)(2)(D) was not intended to narrow review, but to ensure that legal and constitutional claims would be reviewable if they were otherwise unreviewable under the 1996 jurisdiction-stripping provisions.

claim relates in some manner to a discretionary decision or action, is supported by the text of Section 1252(a)(2)(B)(ii) (with its emphasis on *discretion*), this Court's repeated admonition that jurisdiction-stripping statutes should be construed narrowly, and the well-established presumption in favor of judicial review. *See, e.g.*, *St Cyr*, 533 U.S. at 298-99 (discussing "strong presumption in favor of judicial review of administrative action"). Thus, as the government argued in the court of appeals, Section 1252(a)(2)(B)(ii) does not apply where the BIA's decision is based on non-discretionary grounds.

2. In this case, however, neither petitioner nor the government has urged this alternative ground for reversal; rather, each has argued solely that motions to reopen are not covered by Section 1252(a)(2)(B)(ii) because there is no discretion-conferring language in the reopening statute. Thus, given that the issue has not been fully briefed or squarely presented, *amicus* urges the Court not to address the issue directly or indirectly, thereby foreclosing its resolution in a future case (assuming it is still an open issue in light of the Court's decision in *Zadvydas*).

In particular, the Court should not adopt the position that the procedures enacted in 1996 for obtaining judicial review of reopening motions would be rendered meaningless if Section 1252(a)(2)(B)(ii) applied to motions to reopen. As noted, that argument assumes that Section 1252(a)(2)(B)(ii) would have eliminated all review, even over factual

and legal claims relating to the denial of a reopening motion.

The fact that these provisions would not be rendered superfluous in no way detracts from the force of the government's and petitioner's submission. Even without this argument, it is clear that Section 1252(a)(2)(B)(ii) does not apply to motions to reopen, given the plain language of the statute, the history of judicial review over such motions, and the strong presumption in favor of judicial review. There is thus no reason for the Court to adopt arguments that would unnecessarily foreclose later resolution of the issue.

Nor does the 2005 passage of 8 U.S.C. 1252(a)(2)(D) render the question academic. As discussed more fully below, Section 1252(a)(2)(D) ensures review over constitutional claims and questions of law and does so notwithstanding the INA's jurisdictional bars, including Section 1252(a)(2)(B)(ii). But Section 1252(a)(2)(D) does not restore review of *factual* claims. As a result, there is enormous practical importance hinging on whether Section 1252(a)(2)(B)(ii) precludes review of all claims or just those that challenge the actual exercise of discretion. In short, *amicus* urges the Court to refrain from commenting, directly or indirectly, on whether Section 1252(a)(2)(B)(ii), where applicable, bars review of all claims or just discretionary determinations.

### C. The Court Need Not Address Section 1252(a)(2)(D) or Determine

**Whether Kucana's Claims Were Factual or Legal.**

1. Section 1252(a)(2)(D) was added to the INA in 2005 and, as noted, ensures review over constitutional claims and "questions of law" and does so notwithstanding the INA's myriad jurisdictional bars (with exceptions not material here).[8] In this case, however, petitioner does not contend that he was raising a question of law, and thus does not argue that even if Section 1252(a)(2)(B)(ii) barred review of his motion to reopen, the court of appeals would have had jurisdiction to review his claims under Section 1252(a)(2)(D).

Instead, petitioner appears to concede that his claim does not fall within Section 1252(a)(2)(D). Pet. Br. at 33 n.15. Moreover, the Seventh Circuit specifically noted that petitioner did not argue below that he was raising a legal claim. 533 F.3d at 538. And the government agrees that Section 1252(a)(2)(D) is not at issue here because petitioner does not assert that he is raising a legal claim. Govt. Br. at 17-18 n.9 (noting that the question presented does not include Section 1252(a)(2)(D)). Given the

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[8] Section 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

parties' positions, the Court need not and should not address the scope of Section 1252(a)(2)(D), and should instead await an actual controversy implicating Section 1252(a)(2)(D).

Nor is there any need for the Court to characterize petitioner's claim as either factual or legal, since that distinction is relevant only with respect to Section 1252(a)(2)(D), and not to any of the arguments advanced by petitioner or the government. As already discussed, both petitioner and the government make only one argument – that Section 1252(a)(2)(B)(ii) is inapplicable to motions to reopen because the discretion-conferring language appears solely in regulations. Neither party makes the alternative argument that even if Section 1252(a)(2)(B)(ii) generally applied to motions to reopen, it would not have barred review in this particular case because Kucana's motion was not denied in the exercise of discretion. *But see* Pet. Br. at 33 n.15.

But even if petitioner or the government had made that alternative argument, there would still be no need for this Court to characterize petitioner's claim as either factual or legal. All that would be necessary would be to decide if Kucana had raised a *non*-discretionary claim, factual or legal. And there is no dispute that he did so. *See* Govt. Br. at 14; Pet. Br. at 33 n.15; 533 F.3d at 537.

In fact, Section 1252(a)(2)(D) is significant only in cases where there is a complete jurisdictional bar that precludes review not just of discretionary

determinations, but of *all* determinations – factual, legal, constitutional and discretionary. *See, e.g.*, *Kamara v. Atty. Gen.*, 420 F.3d 202, 210-11 (3d Cir. 2005) (interpreting complete bar on reviewing claims raised by aliens removable on the basis of a criminal conviction); *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (per curiam) (interpreting complete bar on all claims related to the asylum-filing deadlines). *See infra* at 25-26 (discussing additional cases).

In these cases, petitioners can only obtain review if they are able to raise legal or constitutional claims, since a full bar precludes review of factual and discretionary claims and Section 1252(a)(2)(D) restores review only over "constitutional claims" or "questions of law." Thus, it is critical in these types of cases that the courts of appeals not only determine whether a claim is discretionary or non-discretionary *but also* whether the claim is factual or legal. In contrast, where the only jurisdictional bar at issue is Section 1252(a)(2)(B)(ii), then the court need only decide whether a claim is discretionary or non-discretionary, since 1252(a)(2)(B)(ii) is a limited bar precluding review only where there is an actual exercise of discretion, as *amicus* explained above.

2. Reserving any issues regarding Section 1252(a)(2)(D) is especially appropriate because the courts of appeals are sharply divided over the meaning of the term "questions of law" in that provision. In particular, the courts are divided over two basic questions. The first is whether the term

"questions of law" is limited to pure questions of law or, instead, covers both pure legal claims as well as those involving the application of law to fact (*i.e.*, mixed questions of law and fact). The second issue concerns how to identify a reviewable mixed question of law and fact (assuming such claims fall within the term "questions of law" in the first place).

The impetus for Section 1252(a)(2)(D) was this Court's decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held that although the bar eliminated the court of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 308-09. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id.* at 300. But the Court in *St. Cyr* also made clear that Congress remained free to enact a substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (internal quotation marks and citation omitted).

Congress took up the Court's invitation in 2005 and eliminated district court habeas review over removal orders, *see, e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to ensure the courts of appeals' petition-for-review

jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 173-75 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).[9]

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[9] Section 1252(a)(2)(D) is applicable to all INA provisions that eliminate or limit judicial review but specifically references Sections 1252(a)(2)(B) and (C). 8 U.S.C. 1252(a)(2)(D). Given that 1252(a)(2)(D) is a catch-all provision, Congress likely did not specifically determine which provisions within the INA did or did not eliminate review of legal and constitutional claims, including whether 1252(a)(2)(B) eliminated review over non-discretionary claims. But, insofar as the 2005 Congress gave the issue any attention, it may have wanted to take precautions because the government had been arguing prior to 2005 that subsection (i) of Section 1252(a)(2)(B) barred review of all determinations *related* to the five forms of discretionary relief enumerated within that subsection, and not simply the ultimate discretionary decision. *See, e.g., Sepulveda v. Gonzales*, 407 F.3d 59, 62 (2d Cir. 2005) (rejecting government's contention that Section 1252(a)(2)(B)(i) barred review "regardless of whether relief was denied as a matter of discretion"); *Prado v. Reno*, 198 F.3d 286, 290 (1st Cir. 1999) (same). The fact that Congress did not also enact a separate provision in addition to Section 1252(a)(2)(D) to clarify any possible confusion about whether provisions such as Section 1252(a)(2)(B) precluded review of factual claims is not surprising given that the 2005 Congress was specifically responding to this Court's decision in *St. Cyr* and its understanding that it was constitutionally obligated to provide review over legal and constitutional claims.

In light of Section 1252(a)(2)(D)'s passage, the courts of appeals uniformly agree that they may now review constitutional claims and questions of law and may do so notwithstanding the INA's jurisdictional bars. But they disagree on whether the term "questions of law" is limited to pure legal claims or, instead, encompasses the application of law to fact as well. *Compare, e.g.*, *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 331 (2d Cir. 2006) ("the term 'questions of law' undeniably can encompass claims of 'erroneous *application* or interpretation of statutes'") (emphasis added by Second Circuit) (quoting *St. Cyr*, 533 U.S. at 302); *Singh v. Gonzales*, 432 F.3d 533, 541 (3d Cir. 2006) ("We have . . . held that [jurisdiction under Section 1252(a)(2)(D)] includes review of the BIA's application of law to undisputed fact"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (finding that "a legal determination involving the application of law to factual findings . . . presents a reviewable decision" under Section 1252(a)(2)(D)); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55 (8th Cir. 2008) (per curiam) (concluding that "whether the IJ properly applied the law to the facts" is a reviewable "legal question"); *Ramadan*, 479 F.3d at 650 (holding that the term "questions of law" in Section 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed facts"); *Jean-Pierre v. Atty. Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007) (concluding that it could review "the application of an undisputed fact pattern to a legal standard"), *with Almuhtaseb v. Gonzales*, 453 F.3d

743, 748 (6th Cir. 2006) (holding that jurisdiction under Section 1252(a)(2)(D) is limited to "review of constitutional claims or matters of statutory construction"); *Viracacha v. Mukasey*, 518 F.3d 511, 515 (7th Cir.) ("the proviso in § 1252(a)(2)(D) is limited to 'pure' questions of law"), *cert. denied*, 129 S.Ct. 451 (2008); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review 'a narrow category of issues regarding statutory construction'") (citation omitted).

In addition, even among those circuits that hold that mixed questions are reviewable under Section 1252(a)(2)(D), there is sharp disagreement over how to identify a mixed question. Among other things, the courts are divided, in result and analysis, on how to differentiate between a reviewable mixed question of law and fact and a pure, underlying fact – what this Court has termed a "basic," "primary" or "historical" fact. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

As this Court has stated, a mixed question of law and fact is one where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

*Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). *See also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "refer to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Yet, notwithstanding this Court's general guidance on the issue, the courts of appeals are divided in the immigration context on how to distinguish between mixed questions and unreviewable pure facts. For example, the courts have disagreed about whether Section 1252(a)(2)(D) permits them to review the BIA's determination that the underlying facts of a case failed to satisfy the standard for relief under the Convention Against Torture (CAT). *Compare, e.g., Toussaint v. Atty. Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) (holding that application of the CAT standard is a legal question because it involves "not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than

not that she will be subject to persecution or torture"), *with Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005) (holding that application of the CAT standard is not a question of law because it comes down to "whether the IJ correctly considered, interpreted, and weighed the evidence presented"); *Saintha v. Mukasey*, 516 F.3d 243, 249-50 (4th Cir.), *cert. denied*, 129 S.Ct. 595 (2008) (application of the CAT standard is an unreviewable factual claim because it would normally be reviewed for substantial evidence).

Similarly, the courts of appeals have disagreed about whether the "extraordinary" or "changed" circumstances exceptions to the one-year asylum-filing deadline are unreviewable factual determinations or, instead, reviewable mixed questions under Section 1252(a)(2)(D). *Compare, e.g.*, *Ramadan*, 479 F.3d at 654, 656 (holding that "changed circumstances" is a "mixed question of law and fact" that is reviewable because "'questions of law' includes review of the application of statutes and regulations to undisputed historical facts"), *with Khan v. Filip*, 554 F.3d 681, 689 n.3 (7th Cir. 2009) (holding that petitioner's argument that the IJ "required him to provide more evidence . . . than is called for by the regulations" is factual because it "is an argument about the sufficiency of the evidence, not the interpretation of the regulation"); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005) ("BIA findings as to timeliness and changed circumstances are usually factual determinations").

3. *Amicus'* position is that Section 1252(a)(2)(D) applies to both pure legal claims and mixed questions of law and fact, and that the complete preclusion of review over the application of law to fact would raise serious Suspension Clause concerns. *See St. Cyr*, 533 U.S. at 301-02 (stating that "[a]t its historical core" the writ of habeas corpus encompassed "errors of law, including the erroneous application or interpretation of statutes"); *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) ("the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law") (quoting *St. Cyr*, 533 U.S. at 302); *Kamara*, 420 F.3d at 211 & n.5 (noting that "if the REAL ID Act imposed a narrower standard of review than that previously offered under a petition for habeas corpus, a significant Suspension Clause issue would arise" and thus concluding that Section 1252(a)(2)(D) covers "issues of application of law to fact") (internal quotation marks omitted); *Chen*, 471 F.3d at 326-27 (construing the REAL ID Act "to encompass the same types of issues that courts traditionally exercised in habeas review," including application or interpretation of statutes, in order to provide the constitutional protection required by the Suspension Clause and *St. Cyr*); *Ramadan*, 479 F.3d at 653 ("preclusion of judicial review over mixed questions of law and fact would raise serious constitutional questions under *St. Cyr*").

Thus, in this case, *if* petitioner had been arguing that the historical facts of his case satisfied some statutory or regulatory legal standard (such as the changed circumstances standard), he would have been raising a reviewable mixed question of law and fact under Section 1252(a)(2)(D). It is unclear what petitioner is precisely arguing but, in any event, neither the government nor petitioner has relied on Section 1252(a)(2)(D). Accordingly, the Court need not characterize the claim as factual or legal, or determine the precise contours of Section 1252(a)(2)(D).

* * * *

The narrow issue in this case should be decided on the ground that Section 1252(a)(2)(B)(ii) does not apply to motions to reopen because the discretion-conferring language appears solely in regulations. The Court should not reach any of the broader jurisdictional issues discussed above, which have not been briefed by the parties and are not squarely presented.

## CONCLUSION

The judgment of the court of appeals should be reversed.

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# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

AGRON KUCANA,

*Petitioner,*

v.

ERIC H. HOLDER, JR.

*Attorney General.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF COURT-APPOINTED AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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## QUESTION PRESENTED

Whether the phrase "decision . . . specified [as discretionary] under this subchapter" in 8 U.S.C. 1252(a)(2)(B)(ii) extends to decisions clearly "specified" as discretionary in regulations duly promulgated "under" the relevant subchapter of the United States Code.

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## INTRODUCTION

This case presents a straightforward question of statutory construction. A provision of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(2)(B)(ii), precludes judicial review of "any" decision of the Attorney General or the Secretary of Homeland Security that is "specified" as discretionary "under" the Act, as long as that decision does not involve a constitutional claim or question of law. A regulation, 8 C.F.R. 1003.2, was amended "under" the Act just months before the enactment of 8 U.S.C. 1252(a)(2)(B)(ii). As so amended, the regulation "specifie[s]" that an agent of the Attorney General, the Board of Immigration Appeals, has discretion to grant or deny motions to reopen immigration proceedings.

Petitioner filed a motion to reopen his immigration proceeding, raising only issues of fact. The Board of Immigration Appeals denied that motion. Petitioner appealed, and the Seventh Circuit, reading the plain language of 8 U.S.C. 1252(a)(2)(B)(ii) and 8 C.F.R. 1003.2, held that the statutory provision stripped the court of jurisdiction to consider Petitioner's appeal. The question here is whether the Seventh Circuit was correct to find that the phrase "decision . . . specified [as discretionary] under this subchapter" in 8 U.S.C. 1252(a)(2)(B)(ii) includes decisions "specified" as discretionary in a regulation duly promulgated under the relevant subchapter of the United States Code.

## STATEMENT

*Section 1252(a)(2)(B)(ii)*: Congress enacted Section 1252(a)(2)(B)(ii) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, in September 1996, as part of a sweeping reform designed to alleviate a major burden on the Nation's courts. As the United States explains, Congress included the section in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546 to 3009-724, a set of amendments to the INA intended "to expedite the removal of criminal and other illegal aliens from the United States." Resp. Br. 2.

IIRIRA was designed to combat aliens' opportunistic (and understandable) practice of using judicial review as a means of delaying deportation. For years before 1996, this Court had recognized that immigration law creates a unique set of incentives to add to the burdens of the federal courts. "[A]s a general matter," the Court explained, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). "One illegally present in the United States who wishes to remain . . . has a substantial incentive to prolong litigation in order to delay physical deportation for as long as possible." *INS.* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). The Court expressed concern—often in the context of reviewing motions to reopen—about two consequences of these incentives: (1) "endless delay[s] of deportation by aliens creative and fertile enough to continuously produce new and material facts," *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144, n.5 (1981) (per curiam) (internal quotation marks omitted); and (2)

"substantial" additional "burdens on the courts," *United States* v. *Ortiz*, 422 U.S. 891, 915 (1975) (White, J., concurring).

Driven by the "strong public interest in bringing [immigration] litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases," *INS* v. *Abudu*, 485 U.S. 94, 107 (1988), Congress decided to act. Noting what he termed "an overuse of due process," the floor manager of the Senate bill that became IIRIRA explained that a primary purpose of the bill was to "greatly reduce the ability of aliens to unlawfully enter this country and then remain here for years through use, or misuse, of various administrative and judicial proceedings and appeals." 142 Cong. Rec. 9766 (1996) (statement of Sen. Simpson).

With IIRIRA, Congress employed strong and far-reaching means to achieve this end: it "substantially limited the availability of judicial review." *Nken* v. *Holder*, 129 S. Ct. 1749, 1755 (2009). "*[M]any* provisions of IIRIRA [were] aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (emphasis in original). To implement this theme, Congress "repealed the old judicial-review scheme . . . and instituted a new (and significantly more restrictive) one."[1] *Id.* at 475.

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[1] This new judicial review scheme has not solved the problem of court overload. For example, Board of Immigration Appeals statistics indicate that the courts of appeals entertained more than 1,290 immigration cases in 2005, 1,791 in 2006, 2,157

Section 1252(a)(2)(B)(ii) is central to IIRIRA's new "and significantly more restrictive" judicial review scheme. The section imposes strict limits on federal courts' jurisdiction to review most discretionary decisions of immigration officials. Specifically, as subsequently amended by the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-323,[2] Section 1252(a)(2)(B)(ii) provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including Section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

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in 2007, and 1,463 in 2008. Executive Office for Immigration Review, *FY 2008 Statistical Year Book* T2 (2009) (Table 2), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf. The table indicates only how many immigration cases the courts *remanded* to the Board in the given year. Assuming the Board occasionally wins on appeal, the number of immigration cases the courts *heard* in each of these years must be still higher.

[2] As the United States explains, the version of Section 1252(a)(2)(B)(ii) that applies here is that "enacted by IIRIRA and amended by the REAL ID Act," because Petitioner "did not seek judicial review of the denial of his second motion to reopen until 2007." Resp. Br. 3-4 n.1.

8 U.S.C. 1252(a)(2)(B)(ii) (2006).

Most of the clauses in the quoted, overlong sentence are irrelevant here.[3] Stripped to its essentials, the relevant part of Section 1252(a)(2)(B)(ii) provides: "Notwithstanding any other provision of law," "no court" may review "any" decision of the Attorney General or Secretary of Homeland Security (Secretary) that is "specified" as discretionary "under" Title 8, Chapter 12, Subchapter II of the United States Code (that is, under 8 U.S.C. 1151-1381). 8 U.S.C. 1252(a)(2)(B)(ii). The question in this case is whether this jurisdictional limitation extends to the Board of Immigration Appeals' decision to deny Petitioner's motion to reopen—a decision by an agent of the Attorney General that is clearly "specified" as discretionary in a regulation promulgated "under" the relevant subchapter.

*Regulation 1003.2*: The regulation that does the "specif[ying]" here is 8 C.F.R. 1003.2 (Regulation 1003.2). Originally promulgated in 1958,[4] 23 Fed.

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[3] No party in this case has invoked "Section 2241 of title 28," nor "any other habeas corpus provision," nor "sections 1361 and 1651 of [Title 28]." "[S]ubparagraph (D)" refers to 8 U.S.C. 1252(a)(2)(D) (Section 1252(a)(2)(D)), which was added to the INA in 2005 in response to this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). REAL ID Act § 106(a)(1)(A)(iii), 119 Stat. 310. That section restores court jurisdiction over "constitutional claims or questions of law," 8 U.S.C. 1252(a)(2)(D)—but no such issues are present in this case, see Resp. Br. 17-18 n.9. Finally, "section 1158(a) of [Title 8]" refers to 8 U.S.C. 1158(a), which governs applications for asylum—also not at issue here, Resp. Br. 17 n.8.

[4] This regulation was originally promulgated as 8 C.F.R. 3.2. 23 Fed. Reg. 9115, 9118 (1958). In 2003, it was redesignated 8

Reg. 9115, 9118 (1958),[5] Regulation 1003.2 addresses those motions to reopen removal proceedings that are filed first with the Board of Immigration Appeals (Board or BIA).[6] As detailed below, *infra* pp. 45-45, the regulation supplies various details, absent from the text of the INA, about the format, content, and timing of motions to reopen and motions to reconsider, and the standard of review applicable to those motions.[7]

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C.F.R. 1003.2. 68 Fed. Reg. 9824, 9830 (2003). For simplicity, the remainder of this brief refers to the regulation by its current designation: 8 C.F.R. 1003.2 or Regulation 1003.2.

[5] The regulation was amended, 27 Fed. Reg. 96, 96-97 (1962) (amending what was then 8 C.F.R. 3.2), before it was finally codified in 1964, 8 C.F.R. 3.2 (Cum. Supp. 1964) (first codification of same).

[6] As the United States explains, aliens may file motions to reopen removal proceedings in two situations: (1) after they are ordered "removed in absentia" for failing to appear at a removal hearing, 8 U.S.C. 1229a(b)(5)(A), or (2) whenever they have "new facts" they wish to "prove[] at a hearing to be held if the motion is granted," 8 U.S.C. 1229a(c)(7)(B). Resp. Br. 4-5. The relevant regulations instruct aliens to file motions to reopen with either an Immigration Judge or the Board, whichever was the last to render an opinion in the alien's case. 8 C.F.R. 1003.2 (Board); 8 C.F.R. 1003.23 (Immigration Judge).

[7] From the United States' opening brief, it may appear that two regulations are relevant here, Regulation 1003.2 and 8 C.F.R. 1003.23 (Regulation 1003.23). As the United States explains, Resp. Br. 4-6, Regulation 1003.2 concerns motions to reopen filed initially with the Board, while Regulation 1003.23 concerns those motions filed first with an immigration judge. Petitioner filed the motion to reopen at issue here with an immigration judge under Regulation 1003.23. On appeal, however, the Board determined that Petitioner should have filed with the Board, J.A. 23a, and it treated his motion as if he had done so. Thus, only Regulation 1003.2 governs the subsequent

The critical language for this case is in the first paragraph of the regulation:

> The decision to grant or deny a motion to reopen or reconsider *is within the discretion of the Board*, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

8 C.F.R. 1003.2(a) (emphasis added). Attorney General Reno added this language specifying that the Board has discretion over the disposition of motions to reopen in April 1996, in a regulatory amendment designed "to implement section 545 of the Immigration Act of 1990, Public Law 101-649, which require[d] both time and number limitations on motions to reopen and reconsider and changes in the substantive and procedural aspects of motion and appeal practice." 60 Fed. Reg. 24,573, 24,573 (1995) (proposing amendments to what is now 8 C.F.R. 1003.2); see also 61 Fed. Reg. 18,900, 18,904 (1996) (final rule). As explained below and in the United States' brief, *infra* p. 34; Resp. Br. 32, this new specification of discretion accorded with courts' almost century-long practice of recognizing Attorney General discretion over motions to reopen.

The new specification of discretion in Regulation 1003.2 entered into effect on July 1, 1996. 61 Fed. Reg. at 18,900. Thus, when Congress passed and the

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disposition of Petitioner's motion to reopen. Moreover, Petitioner's Question Presented in this case is limited to whether Section 1252(a)(2)(B)(ii) "strips jurisdiction from federal courts to review *rulings on motions to reopen by the Board*" – that is, rulings on motions filed under Regulation 1003.2. Pet'r Br. i (emphasis added).

President signed IIRIRA on September 30, 1996, see 110 Stat. 3009-749, there was in place brand new regulatory language that made clear that the decision whether to grant or deny a motion to reopen is within the discretion of the Attorney General.

*Petitioner*: Finally, although this case presents a narrow issue of law, Petitioner's story provides important context. Petitioner is an Albanian citizen who overstayed his visitor visa more than 13 years ago. J.A. 6-7. He filed an application for asylum in spring 1996. *Id.* at 7 n.2, 30. The Immigration and Naturalization Service (INS) referred Petitioner's asylum application to an immigration judge and placed Petitioner "in deportation proceedings through the issuance of an Order to Show Cause." *Id.* at 7 & n.2, 30. Petitioner appeared with counsel at the show cause hearing, "admitted each of the factual allegations" against him, and "conceded deportability." *Id.* at 7, 30. The immigration judge then scheduled a hearing on the merits of Petitioner's asylum petition, but Petitioner failed to appear. *Id.* Accordingly, on October 9, 1997, the judge ordered Petitioner "removed in absentia" under 8 U.S.C. 1229a(b)(5)(A). *Id.* at 7, 33.

Petitioner filed a motion to reopen, explaining that he missed the hearing because he overslept, and requesting that the immigration judge rescind the order. *Id.* at 8, 30. The judge denied the motion, concluding that Petitioner's explanation for his absence did not meet the INA's "exceptional circumstances" standard. J.A. at 8, 31-32; see also 8 U.S.C. 1229a(b)(5)(C)(i) (invoking the "exceptional circumstances" standard of 8 U.S.C. 1229a(e)(1)). The Board affirmed the denial without opinion in May 2002. J.A. 28.

This first motion to reopen is not, however, the motion at the center of this case. Almost nine years after an immigration judge first ordered Petitioner removed, Petitioner filed a second motion to reopen his removal proceedings. *Id.* at 16-19. This second motion principally claimed that conditions in Petitioner's home country had changed for the worse. *Id.* at 18-19; see also Pet. App. 11a-12a (noting that although Petitioner offered "a second argument in support of reopening"—namely, his mother's application, filed on his behalf, for a relative visa—he did not press this second argument in his appeal to the Board).

The immigration judge gave this second motion full consideration but denied it, noting, among other things, that although Petitioner "asserted fear of persecution on account of his involvement with the pro-democracy movement in Albania prior to his arrival in the United States," his motion to reopen "conveniently neglect[ed] to mention that the Democratic Party," which Petitioner had supported, "won Albania's most recent elections." J.A. 12-13.

On appeal from this denial, the Board concluded that the motion had never properly been before the immigration judge: because the "Board was last to render a decision" in Petitioner's case, "[j]urisdiction . . . remained with the Board to consider" Petitioner's second motion to reopen. Pet. App. 23a. Turning to the merits, the Board, too, noted that "the current Prime Minister of Albania is from the Democratic Party." *Id.* at 24a. From this and a few other details of conditions in that country, the Board concluded that Petitioner had not "established his prima facie eligibility for asylum or withholding of deportation in the United States based on material changes that

have occurred in Albania since his failure to appear before the immigration Judge in October 1997." *Id.* at 25a-26a.

Petitioner then sought review in the Seventh Circuit. That court briefly explained that it did not believe the Board had abused its discretion. *Id.* at 3a. Ultimately, however, the court did not affirm the Board's decision but instead dismissed the petition for review on the ground that the jurisdiction-stripping effect of Section 1252(a)(2)(B)(ii) extends to decisions of the Attorney General that are made discretionary by a regulation issued "under" the INA, and thus that the section precludes federal court review of the Board's discretionary denial of Petitioner's motion to reopen. *Id.* at 4a-12a.

## SUMMARY OF ARGUMENT

Section 1252(a)(2)(B)(ii) strips courts of appellate jurisdiction in those cases, including Petitioner's, in which the Board denies a motion to reopen for reasons that are purely fact-based.

Section 1252(a)(2)(B)(ii) provides that "no court" may review "any" decision of the Attorney General or the Secretary that is "specified" as discretionary "under this subchapter" (that is, under Title 8, Chapter 12, Subchapter II of the United States Code). "Under" is Congress's and this Court's word of choice to describe the relationship between regulations and the statutes "under" which they are promulgated. Congress's decision to use the word "under" in Section 1252(a)(2)(B)(ii) unambiguously extends the section's reach beyond decisions that are "specified" as discretionary "in" the Act itself to decisions "specified" as discretionary in regulations

adopted "under" the Act. Other expansive words in Section 1252(a)(2)(B)(ii), including the word "any," confirm the section's sweeping reach. Moreover, because the section contains two express exceptions to its otherwise far-reaching jurisdictional limitation, additional exceptions are not to be implied.

The object, purpose, and legislative history of Section 1252(a)(2)(B)(ii) support this reading of the text. The section was the centerpiece of a 1996 congressional effort to adopt a new and far more restrictive judicial review scheme for immigration matters. Recognizing that federal courts were overwhelmed with immigration cases, Congress acted decisively to curtail judicial review in this area. The chief House sponsor of IIRIRA explained that with Section 1252(a)(2)(B)(ii), Congress intended to limit judicial review of all discretionary decisions of immigration officials. Additionally, the only description of Section 1252(a)(2)(B)(ii) provided to Members of Congress before they voted on IIRIRA explained cursorily that the provision stripped courts of jurisdiction to review "any decision . . . specified to be" in the Attorney General's discretion—identifying no limitation on the source of the specification.

Most important, there is a pellucid regulation, 8 C.F.R. 1003.2, that "specifie[s]" that the Board, an agent of the Attorney General, has discretion over motions to reopen filed with it. Attorney General Reno duly adopted the regulatory specification of discretion just a few months *before* Congress enacted IIRIRA and Section 1252(a)(2)(B)(ii). When Congress stripped federal courts of jurisdiction to review the discretionary decisions of the Attorney General, therefore, it had every reason to know that a direct

consequence would be to preclude review of Board denials of fact-based motions to reopen.

Regulation 1003.2 and the 1003.2 Amendments, which added the specification of discretion, were issued "under" the identified subchapter of the United States Code. They are not procedurally or legally defective. And they raise no relevant constitutional concerns, because (1) another provision of the INA, 8 U.S.C. 1252(a)(2)(D), ensures court jurisdiction to review those motions to reopen that raise legal or constitutional claims, and (2) the timeline here—with the 1003.2 Amendments predating Section 1252(a)(2)(B)(ii)—establishes that Congress, not the Attorney General, made the decision to limit court jurisdiction in this circumstance. Regulation 1003.2 is therefore a properly promulgated, lawful agency regulation with the force and effect of law.

Finally, because Section 1252(a)(2)(B)(ii) and Regulation 1003.2 are unambiguous with respect to the issue before this Court, no deference is due to the Attorney General's litigating position that the provisions do not mean what they say. Under Section 1252(a)(2)(B)(ii), the Attorney General may (within limits) identify *whether* decisions are discretionary, but he may not now curtail the jurisdictional effect of his office's pre-IIRIRA decision to place the Board's decisions on motions to reopen in that category.

## ARGUMENT

Congress commonly leaves statutory gaps for the relevant agency "to fill . . . in reasonable fashion" with regulations. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005). In ordinary legal parlance, the resulting regulations are described as being "under" the statutes they explicate.

In this case, the Attorney General adopted a regulation under the immigration laws to fill evident gaps in those laws' explication of the procedure and standard of review for motions to reopen removal proceedings. That regulation specifies that an agent of the Attorney General, the Board, has discretion over the disposition of such motions. By its terms, therefore, the later-enacted Section 1252(a)(2)(B)(ii), which strips courts of jurisdiction to review any decision of the Attorney General that is "*specified*" as discretionary "*under*" the immigration laws, 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added), bars review of the Board's decision to deny Petitioner's motion to reopen his removal proceeding.

### I. ON ITS FACE, SECTION 1252(a)(2)(B)(ii) BARS JUDICIAL REVIEW OF DECISIONS AND ACTIONS MADE DISCRETIONARY BY A REGULATION DULY PROMULGATED UNDER TITLE 8, CHAPTER 12, SUBCHAPTER II OF THE UNITED STATES CODE.

"The starting point in statutory interpretation is the language [of the statute] itself," *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991) (alteration in original)

(internal quotation marks omitted), and there is a strong presumption that the statute's plain language expresses congressional intent, see *Rubin* v. *United States*, 449 U.S. 424, 430 (1981). By its terms, the text of 8 U.S.C. 1252(a)(2)(B)(ii) unambiguously precludes judicial review of the Board's denial of a motion to reopen if a regulation duly adopted "under" Title 8, Chapter 12, Subchapter II of the United States Code gives the Board discretion over those motions.

### A. The Phrase "Specified Under This Subchapter" Encompasses Both Language In The Subchapter Itself And Language In Regulations Promulgated Under The Subchapter.

The pertinent language of Section 1252(a)(2)(B)(ii) provides: "Notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to review" decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary." 8 U.S.C. 1252(a)(2)(B)(ii). On its face, this language bars review in all instances in which the authority for the relevant decision is specified "under this subchapter" to be discretionary. Petitioner and the United States ask this Court to read the statute as if it said "*in* this subchapter" or "*within* this subchapter," but Congress selected the preposition "under," clearly intending to reach not only decisions specified as discretionary *in* the text of the subchapter, but also those specified as discretionary in regulations adopted *under* the subchapter.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). In common English, "under" refers to things that are subordinate, in precisely the way that a regulation is subordinate to its authorizing statute. See *Cambridge Dictionary of American English* 951 (2008) ("under" is "a position below or lower than"); *The American Heritage College Dictionary* 1494 (2008) ("beneath or below in position; inferior or subordinate in rank or importance").

In the legal lexicon, the word "under" is the common way to express the relationship of a regulation to its authorizing statute. See Bryan A. Garner, *The Redbook: A Manual on Legal Style* (*Redbook*) 159-60 (2002); see also *Bouvier's Law Dictionary* 3351 (1984) ("under" means "below in position" or "inferior" or "subordinate"). Congress has used the word "under" in this way hundreds of times in the United States Code. See Appendix A (listing 400 examples of statutory references to regulations as "under" their authorizing statutes).

Indeed, in Title 8 itself, Congress repeatedly describes the regulations authorized by the INA as being issued "under" that Act. See, *e.g.*, 8 U.S.C. 1101(a)(9) ("regulations prescribed *under* authority contained in this chapter"); 8 U.S.C. 1103(a)(4), (6), (10) ("regulations issued there*under*"); 8 U.S.C. 1104(a) ("regulations issued there*under*"); 8 U.S.C. 1182(a)(7)(A)(i)(I) ("regulations issued by the Attorney General *under* section 1181(a) of this title"); 8 U.S.C. 1201(a)(1), (g) ("regulations issued

there*under*"); 8 U.S.C. 1204 ("regulations prescribed *under* this chapter"); 8 U.S.C. 1229a(b)(6)(A) ("shall, by regulation . . . define in a proceeding before an immigration judge or before an appellate administrative body *under* this subchapter"); 8 U.S.C. 1323(a)(1) ("regulations issued there*under*") (emphasis added in all). As this Court has explained, "equivalent words have equivalent meaning when repeated in the same statute." *Cohen* v. *de la Cruz*, 523 U.S. 213, 220 (1998); see also *Comm'r* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (setting forth the textual canon that "identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks omitted)). When Congress chose to use the word "under" rather than "in" in Section 1252(a)(2)(B)(ii), therefore, it presumably did so deliberately, to reach regulations issued "under" the relevant subchapter.

This Court's use of the word "under" is also relevant, because the Court presumes "that Congress expects its statutes to be read in conformity with this Court's precedents." *Clay* v. *United States*, 537 U.S. 522, 527 (2003) (internal quotation marks omitted). That use is telling here: the Court regularly refers to immigration regulations—including regulations governing motions to reopen—as "under" the INA and its predecessor statutes. See, *e.g.*, *Rios-Pineda*, 471 U.S. at 446 ("the Attorney General has promulgated regulations *under* the [INA]"); *Jong Ha Wang*, 450 U.S. at 140-41 ("The [INA] itself does not expressly provide for a motion to reopen, but regulations promulgated *under* the Act allow such a procedure"); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 208 (1968) ("regulations promulgated *under* the [INA's] authority"); *Abel* v. *United States*, 362 U.S.

217, 232 (1960) ("regulations *under* [the INA]"); *Marcello* v. *Bonds*, 349 U.S. 302, 308 (1955) ("The regulations *under* § 242(b) [of the INA]"); *United States ex rel. Polymeris* v. *Trudell*, 284 U.S. 279, 281 (1932) ("By § 13 [of the Immigration Act] and the regulations *under* it") (emphasis added in all). Moreover, the Court has expressly recognized that in a statutory scheme, the word "under" refers to law that is either authorized by the statute or promulgated pursuant to it. See *Fla. Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2332 (2008) (agreeing with Florida that "'under' . . . should be read to mean 'with the authorization of' or 'inferior or subordinate' to its referent"); *Ardestani*, 502 U.S. at 135 (indicating that the most natural reading of a statute's applicability to adjudications "under" a section must be "subject to," "governed by," or "by reason of the authority of" that section (internal quotation marks omitted)).

Prominent legal style books, too, agree that "under" is synonymous with "pursuant to," and they instruct that "under" is preferred. See Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 113 (2008) (advising that "*pursuant to*" "can almost always be replaced with . . . *under*" (italics in original)); Joseph Kimble, *Lifting the Fog of Legalese* 72, 93 (2006); *Redbook* 159–60; *Bouvier's Law Dictionary* 3351. Thus, while "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context," *Ardestani*, 502 U.S. at 135, ordinary usage, common congressional usage, and this Court's usage all indicate that in a phrase like "under this subchapter," "under" extends to regulations issued "pursuant to" the subchapter.

The United States also appears to recognize the significance of Congress's word choice. In numerous places in its opening brief, the Government creatively paraphrases Section 1252(a)(2)(B)(ii), replacing "under" with "in." See Resp. Br. 17 ("statement [of discretion] must appear *in* a certain part of the Act"); *id.* at 22 ("nothing *in* the relevant subchapter of the INA specifies that the Attorney General has discretionary authority"); *id.* ("requirement that discretionary authority be 'specified' *in* 'this subchapter'"); *id.* at 28 ("for which the Attorney General's authority is provided *in* Subchapter II"); *id.* at 34 ("decisions of the Attorney General or the Secretary that are specified *in* the relevant subchapter"); *id.* ("did not specify anywhere *in* the relevant subchapter") (emphasis added in all). In fact, Congress's use of the preposition "under" so undermines the United States' position that in one instance the Government inadvertently omits the word from a direct quotation of the statute. Resp. Br. 11 (misquoting the statutory language as eliminating jurisdiction for review of any decision "'the authority for which is specified *in* [the relevant subchapter] to be in the discretion of the Attorney General'" (substitution in original) (emphasis added)).

Congress certainly could have opted to limit the reach of the jurisdictional bar in Section 1252(a)(2)(B)(ii) to decisions and actions specified as discretionary "*in* this subchapter."[8] Indeed, Congress

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[8] Even if the reach of Section 1252(a)(2)(B)(ii) were limited in this way, the section arguably still would strip courts of jurisdiction to review Board denials of motions to reopen. This brief focuses on the specification of discretion contained in

has used this phrasing thousands of times in the United States Code, presumably to require "inclusion, location, or position within [the] limits" of the statute itself. *Merriam-Webster's Collegiate Dictionary* 627 (2004) (defining "in"). For example,

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Regulation 1003.2, but the language of the INA provision governing Petitioner's motion to reopen, 8 U.S.C. 1229a(c)(7)(B), itself suggests that the decision whether to grant such a motion is discretionary.

Many of the statutory provisions that Petitioner and the United States characterize as committing issues to the Attorney General's discretion say merely "the Attorney General may . . .," or otherwise imply discretion, without ever using the word "discretion." See Pet'r Br. 2-3 & n.2; Resp. Br. 20 & n.12 (noting that "several more provisions commit decisions" to the Attorney General's discretion "using words that are functionally equivalent to 'discretion'"); 8 U.S.C. 1153(b)(2)(B)(i) ("[T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A)."); see also *Alaka* v. *Att'y Gen.*, 456 F.3d 88, 96-98 (discussing Congress's use of the verb "may" to confer discretion). Indeed, Section 1252(a)(2)(B)(ii) itself identifies such a provision. That section extends to discretionary decisions "other than the granting of relief under section 1158(a) of this title." 8 U.S.C. 1252(a)(2)(B)(ii). But Section 1158(a), which concerns asylum applications, nowhere explicitly states that the decision to grant asylum is discretionary. In fact, that section does not even say that an agent of the Attorney General "may" grant the application. Rather, that provision says only, "[a]ny alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum." 8 U.S.C. 1158(a). The reader must deduce from the context that review of the application is discretionary. Likewise, the statutory language governing motions to reopen anticipates an exercise of Attorney General discretion when it states, "[t]he motion to reopen shall state the new facts that will be proven at a hearing to be held *if the motion is granted*." 8 U.S.C. 1229a(c)(7)(B) (emphasis added). The implication is that the Attorney General *may* grant the motion, just as he *may* grant asylum.

Title 8 itself repeatedly uses the phrases "*in* this chapter" or "*in* this subchapter" to refer to material actually located within the statutory text. See, *e.g.*, 8 U.S.C. 1102 ("provided *in* this chapter"); 8 U.S.C. 1159(a)(2) ("notwithstanding any numerical limitation specified *in* this chapter"); 8 U.S.C. 1160(d)(3)(A) ("otherwise provided *in* this chapter"); 8 U.S.C. 1229a(a)(3) ("Unless otherwise specified *in* this chapter"); 8 U.S.C. 1533(d) ("except as they are specifically referenced *in* this subchapter") (emphasis added in all). Had Congress wished similarly to limit the reach of Section 1252(a)(2)(B)(ii)'s jurisdictional bar, it knew how to do so. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and alteration omitted)).

In fact, if Congress had intended to limit Section 1252(a)(2)(B)(ii)'s jurisdictional bar to those cases in which the statutory text itself specifies a decision as discretionary, many easier phrasings were available. Congress could have said, for example, "any other decision or action specified in this subchapter to be in the discretion of the Attorney General or the Secretary," or "any other decision or action that Congress specifies is in the discretion of the Attorney General or the Secretary." Instead, the drafters used the passive voice—"which is specified under this subchapter to be"—to avoid identifying the entity doing the specifying. The resulting awkward text is a linguistically inefficient way to impose a jurisdictional bar that reaches only decisions

specified as discretionary *in* the subchapter, but it is the easiest way to convey that Section 1252(a)(2)(B)(ii) extends to decisions specified as discretionary in the subchapter *or in regulations issued thereunder*.

In sum, Congress did not limit the reach of Section 1252(a)(2)(B)(ii) to decisions made discretionary *in* the subchapter. That section extends to decisions made discretionary in the subchapter or in regulations promulgated *under* the subchapter, and neither Petitioner nor the United States nor this Court may read the relevant preposition—"under"—out of the phrase Congress drafted. The parties and the Court must "respect[ ] the words of Congress," *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004), by honoring its choice to include within its jurisdictional bar every decision for which the Attorney General or Secretary's discretion is set forth "*under* this subchapter."

### B. Other Textual Cues In Section 1252(a)(2)(B)(ii) Confirm That It Is To Be Read Broadly.

In addition to this evidence that Congress used the word "under" in Section 1252(a)(2)(B)(ii) in its ordinary way—to refer to language in the statute and to regulations promulgated under the statute—other textual signals in the section confirm Congress's intent to impose a far-reaching jurisdictional bar.

#### *(i) The section includes several expansive words and phrases.*

The language at issue in this case is prefaced by a catch-all provision in which Congress emphasized

that the jurisdictional bar applies to "any" decision or action specified to be discretionary. 8 U.S.C. 1252(a)(2)(B)(ii). "Read naturally, the word 'any' has an expansive meaning," *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997), and this Court has long respected Congress's use of "any" to convey a "broad meaning," *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831, 835-36 (2008). Particularly when it is placed at the beginning of an otherwise unlimited catch-all phrase, the word "any" is susceptible to only one, "expansive" meaning: "'one or some indiscriminately *of whatever kind*.'" *Ali*, 128 S. Ct. at 836 (quoting *Gonzales*, 520 U.S. at 5 (quoting *Webster's Third New International Dictionary* 97 (1976) (emphasis added))).

In statutory interpretation cases involving the term "any," the Court has flatly rejected litigants' efforts to narrow a catch-all statutory category (here, *any* decision specified *under* the subchapter to be discretionary) to a single subcategory (here, that subset of decisions specified *in* the subchapter to be discretionary). See *Ali*, 128 S. Ct. at 836 (holding that a Bureau of Prison warden is "any other law enforcement officer," under a provision of the Federal Tort Claims Act excepting such officers from waiver of sovereign immunity, despite some evidence that Congress intended the provision to cover only a smaller subset of officers); *Gonzales*, 520 U.S. at 5 (holding that a statutory sentence enhancement requiring the sentence not to run concurrently with "any other term of imprisonment" applies to state as well as federal sentences, notwithstanding the subsection's initial reference to federal drug trafficking crimes); *Collector* v. *Hubbard*, 79 U.S. (12 Wall.) 1, 15 (1871) (concluding "it is quite clear" that

a statute prohibiting the filing of suit "in any court" "includes the State courts as well as the Federal courts," despite some reasons to limit the prohibition). The Court is now being asked to determine whether "any . . . decision . . . specified under this subchapter to be" discretionary, 8 U.S.C. 1252(a)(2)(B)(ii), "means what it says, or . . . should be limited to some subset" of the referenced discretionary decisions. *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980). As in these cases, the use of the expansive modifier "any" leaves "no basis in the text for limiting" the provision's coverage. *Gonzales*, 520 U.S. at 5. Because "Congress could not have chosen a more all-encompassing phrase than 'any other [decision or action]' to express [its] intent," *Ali*, 128 S. Ct. at 837, the analysis of these cases "applies equally to the expansive language Congress employed in [Section 1252(a)(2)(B)(ii)]," *id.* at 836.

Furthermore, "any" is not the only expansive term in Section 1252(a)(2)(B)(ii). In language modified by the REAL ID Act of 2005, Congress emphasized that the jurisdictional bar should be observed "[n]otwithstanding any other provision of law (statutory *or nonstatutory*)." REAL ID Act § 106(a)(1)(A)(ii), 119 Stat. 310 (adding the phrase "(statutory or nonstatutory)"); 8 U.S.C. 1252(a)(2)(B) (emphasis added). In so doing, Congress both confirmed its recognition of the role that *regulatory* provisions play in the immigration context and expressed its desire that the jurisdictional bar of Section 1252(a)(2)(B)(ii) be read broadly. *United States* v. *Clintwood Elkorn Mining Co.*, 128 S. Ct. 1511, 1518 (2008) (holding that an argument for a narrow reading will be "unavailing" where there is "explicit and expansive statutory language"). Another

2005 addition to the section further emphasizes the latter point: Section 1252(a)(2)(B) now applies "regardless of whether the . . . action [for which review is sought was taken] in removal proceedings," REAL ID Act § 101(f)(2), 119 Stat. 305, thereby conveying Congress's intent that no exceptions be read into the rule.

*(ii) Where Congress wanted to limit the section's reach, it did so explicitly.*

Moreover, this Court has noted that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks omitted). Congress clearly carved out two exceptions to the jurisdictional bar of Section 1252(a)(2)(B)(ii): the section excepts issues referenced "in subparagraph (D)," 8 U.S.C. 1252(a)(2)(B), as well as "the granting of relief under section 1158(a) of this title," 8 U.S.C. 1252(a)(2)(B)(ii). "Subparagraph (D)" refers to Section 1252(a)(2)(D), which restores appellate court jurisdiction to review constitutional and legal claims. "[T]he granting of relief under section 1158(a)" refers to the granting of asylum petitions under 8 U.S.C. 1158(a). See *supra* p. 5 n.3. By specifying these two exceptions to the reach of Section 1252(a)(2)(B)(ii), Congress precluded any other exceptions to its otherwise broad command that "no court shall have jurisdiction to review . . . any" decision specified "under this subchapter" to be discretionary.

Thus, both the text and the context of the phrase at issue in this case—"under this subchapter"—

reveal a straightforward statutory command to bar judicial review of a decision or action made discretionary by a regulation duly promulgated "under this subchapter." Because Congress "says in a statute what it means and means in a statute what it says there," *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992), the Court should take Congress at its word.

### C. The Court Need Not Rely On Tiebreaking Canons To Interpret This Unambiguous Statute.

Petitioner invokes the so-called "immigration rule of lenity"[9] and the canon that favors interpreting statutes to allow for judicial review of administrative action, Pet'r Br. 26-27, 33-34, but there is no ambiguity in Section 1252(a)(2)(B)(ii) that requires resort to either canon. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("When the words of a statute are unambiguous, . . . this first canon is also the last: judicial inquiry is complete." (internal quotation marks omitted)). Congress plainly wanted to impose broad restrictions on judicial review to bring the kind of gamesmanship visible in this case to an end, and Section 1252(a)(2)(B)(ii) uses clear and expansive language to accomplish that end.

As Petitioner acknowledges, Pet'r Br. 33, the Court has "repeatedly emphasized that the touchstone of the rule of lenity is statutory

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[9] As the United States notes, Petitioner "did not argue below that any ambiguities in 8 U.S.C. 1252(a)(2)(B)(ii) should be resolved in his favor." Resp. Br. 36 n.19.

ambiguity," and that the rule therefore is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990) (internal quotation marks omitted). A statute is not ambiguous for purposes of lenity merely because there exists "a division of judicial authority" over its proper construction. *Id.* at 108. Absent ambiguity, there is "no occasion to invoke the rule of lenity." *Deal* v. *United States*, 508 U.S. 129, 135-36 (1993); see also *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 40, 42 (2006) (declining to apply the "principle of construing any lingering ambiguities in deportation statutes in favor of the alien" in light of the countervailing "facial reading" of the statute and other clear evidence of intent (internal quotation marks omitted)).

Likewise, "[t]he presumption favoring judicial review of administrative action is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). Here, there is both specific language and, as discussed further below, specific legislative history. "The words, structure and history of the . . . amendments to the [INA] clearly reveal," *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 124 (1987), that Congress intended Section 1252(a)(2)(B)(ii)'s jurisdictional bar to be far-reaching. The section uses expansive terms like "notwithstanding," "any," "regardless," and most

importantly "under." Construing the section "both with precision and with fidelity to the terms by which Congress . . . expressed its wishes," *Cheng Fan Kwok*, 392 U.S. at 212, leaves no room for operation of the cited presumptions. Because "the congressional intent to preclude judicial review is fairly discernible" in this case, any presumption favoring judicial review is "overcome by specific language," *Block*, 467 U.S. at 349, 351 (internal quotation marks omitted), as well as by "inferences of intent drawn from the statutory scheme as a whole," *United States* v. *Fausto*, 484 U.S. 439, 452 (1988) (internal quotation marks omitted).

Petitioner argues that "[t]he consequences" of precluding review here would be "unacceptably far-reaching," Pet'r Br. 38, but this Court has made clear that it "will not alter the text in order to satisfy the policy preferences of [a party]," for "[t]hese are battles that should be fought among the political branches," and the parties should not "seek to amend the statute by appeal to the Judicial Branch." *Barnhart*, 534 U.S. at 462. See also *Dodd* v. *United States*, 545 U.S. 353, 359-60 (2005) ("Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted. . . . The disposition required by the text here, though strict, is not absurd. It is for Congress, not this Court, to amend the statute if it believes that the [result of the decision is] unduly restrict[ive]."). The policy preferences expressed by Petitioner and his Amici are just that: policy preferences for consideration by policymakers. The language of Section 1252(a)(2)(B)(ii) is unambiguous and far-reaching, and its import is clear. The section strips courts of jurisdiction to review "any" decision of the Attorney General that is specified as

discretionary in the INA or in regulations implementing the Act. Even if this Court "disagree[s]" with Congress's decision to impose such a far-reaching jurisdictional limit, the Court does "not have license to question the decision on policy grounds." *Tyler* v. *Cain*, 533 U.S. 656, 663 n.5 (2001).

## II. THE OBJECT, PURPOSE, AND LEGISLATIVE HISTORY CONFIRM THAT CONGRESS INTENDED SECTION 1252(a)(2)(B)(ii) TO BAR JUDICIAL REVIEW OF DECISIONS SPECIFIED AS DISCRETIONARY IN A DULY ADOPTED REGULATION.

"The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." *Ardestani*, 502 U.S. at 135-136 (internal quotation marks and citations omitted). In this case, far from rebutting that presumption, all other indicia of congressional intent—including the overarching purpose of the legislative reform that brought about this provision, the congressional dialogue that preceded the passage of Section 1252(a)(2)(B), and the legal background against which Congress acted—support the plain-text reading of the statute.

### A. The Object And Purpose Of IIRIRA Confirm Congress's Intent To Enact A Sweeping Jurisdictional Bar.

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language" and "the structure of the statutory scheme," but also from the statute's

"objectives," and "its legislative history." *Block*, 467 U.S. at 345; see also *Fausto*, 484 U.S. at 444-46 (giving weight to the "leading purpose" of the Act in question and the criticisms of the prior system of review in finding that Congress intended to strip the courts of jurisdiction). The story of IIRIRA confirms that the enacting Congress contemplated that Section 1252(a)(2)(B)(ii) would bar judicial review of those decisions of the Attorney General or Secretary that are specified as discretionary either in statutory language or in a duly promulgated regulation.

IIRIRA was not Congress's first effort to streamline the deportation process and prevent aliens from abusing the court system. In fact, IIRIRA came six years after 1990 reform legislation that had taken some first steps toward eliminating the perverse incentives created by the promise of procedural delay. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The earlier, significantly milder reform effort had set strict deadlines for petitions for review, permitted aliens fewer bites at the apple of judicial review, and attempted to expedite the removal process in other ways. See *Stone v. INS*, 514 U.S. 386, 400-01 (1995). In particular, the 1990 Act demanded that "whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order."[10]

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[10] Petitioner and the United States make much of this consolidation provision, 8 U.S.C. 1252(b)(6), arguing that Congress would not have required the consolidation of review of the denial of a motion to reopen with review of the underlying

Immigration Act of 1990 § 545(b)(3), 104 Stat. 5065 (codified with technical amendments at 8 U.S.C. 1252(b)(6)).

By 1996, it was clear that this milder reform had not been sufficient to reduce the immigration caseload, and Congress "sought, once more and yet more aggressively[,] to expedite the removal of illegal aliens from the United States." Resp. Br. 34. Therefore, in IIRIRA, Congress took more drastic measures. See *supra* pp. 2-5.

Given the escalating burden that immigration cases placed on the judiciary, and the breadth of IIRIRA's proposed solution, Congress could not have

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removal order if legislators had not intended to permit judicial review of the former. Petr. Br. 29; Resp. Br. 30-31. The explanation may be simple oversight, but there are two more satisfying explanations. First, decisions on motions to reopen are reviewable if they present constitutional claims or questions of law, 8 U.S.C. 1252(a)(2)(D); the existence of the consolidation provision is thus consistent with the fact that in some, purely factual cases—including Petitioner's—there is no review at all. Second, Congress may have intended (1) to strip courts of jurisdiction to review decisions specified as discretionary in regulations (including decisions on motions to reopen); and yet also (2) to leave room for the Attorney General to amend the relevant regulations and disclaim unreviewable discretion over those decisions (a change that would restore federal court jurisdiction, and thus would raise no constitutional concerns). One consequence of delegating a decision like what-terms-to-specify-as-discretionary is that the delegator, Congress, cannot be sure how the delegate, the Attorney General, will choose to exercise the authority. Congress had to provide for either eventuality—that is, for the Attorney General to continue to specify motions to reopen as discretionary and thus unreviewable, or for him instead to remove the "discretion" language from the relevant regulation.

intended for Section 1252(a)(2)(B)(ii), the Act's central jurisdiction-stripping measure, to have exclusions of the scale that Petitioner suggests. It would frustrate the drafters' manifest purpose—and turn a blind eye to the "object and policy" of the law, *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991)—to read that section as if it imposed very modest limits on judicial review of aliens' claims,[11] when Congress plainly intended to leave *all* discretionary immigration matters in the hands of executive decisionmakers, and thereby to eliminate aliens' ability to benefit themselves by overloading the federal courts.

### B. The Legislative History Of IIRIRA Confirms Congress's Intent To Enact A Sweeping Jurisdictional Bar.

Representative Lamar Smith, the chief House sponsor of IIRIRA, explained soon after the Act's passage that curtailing federal courts' jurisdiction to hear immigration appeals was a critical feature of

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[11] This case cannot be resolved by distinguishing between substantive and procedural decisions, as Judge Ripple suggests in concurrence below. Pet. App. 14a (Ripple, J., concurring). Even if Section 1252(a)(2)(B)(ii) extended only to actions and decisions that the INA itself specifies as discretionary, the section would still operates to deny aliens review of some substantive decisions of the Board, because the Act specifies certain substantive decisions as discretionary. See, *e.g.*, 8 U.S.C. 1182(h) (specifying that the Attorney General "may, in his discretion" waive an alien's inadmissibility for certain criminal offenses); see also Resp. Br. 27 & n.16 (discussing similar provisions).

Congress's effort to limit aliens' ability to forestall their removal from the country. Representative Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 St. Mary's L. J. 883, 918-19 (1997). Specifically, Representative Smith indicated that Congress opted to preclude judicial review of *all* "issues pertaining to purely discretionary relief," which the drafters believed "should remain within the sole discretion of the Attorney General and, thus, . . . no longer [be] appealable to the federal courts." *Id.* at 919.

The legislative history of Section 1252(a)(2)(B)(ii) supports this account and makes clear that the Members of Congress who voted on IIRIRA understood that section to have the broad contours later outlined by Representative Smith. The portion of IIRIRA that became Section 1252(a)(2)(B)(ii) did not appear in any form in any of the pre-conference versions of the bill. The section was added in conference and addressed for the first time in the conference report. H.R. Rep. No. 104-828, at 63, 219 (1996) (Conf. Rep.).[12] The IIRIRA Conference Report

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[12] Given the last-minute timing and Members' heavy reliance on conference reports, such reports are "the most reliable evidence in legislative history of congressional intent." *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 147 (2d Cir. 2002); see also *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) ("Because a conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent." (internal quotation marks omitted)); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) ("a congressional conference report is recognized as the most reliable evidence of congressional intent.").

was issued less than twenty-four hours before the House voted, 142 Cong. Rec. 24,801-02 (Sept. 25, 1996), and less than six days before the Senate voted and the President signed IIRIRA into law, 142 Cong. Rec. 26,735-36 (Sept. 30, 1996) (voice vote on The Department of Defense Appropriations Act of 1997, H.R. 3610, 104th Cong. Div. C (1996)); Statement on Signing the Omnibus Consolidated Appropriations Act, 1997, 2 Pub. Papers 1729-732 (Sept. 30, 1996).

In the report, the conferees gave their colleagues a single statement on the operation of Section 1252(a)(2)(B), the revised bill's new jurisdiction-stripping provision:

> This subsection also bars judicial review (1) of any judgment whether to grant relief under section 212 (h) or (i), 240A, 240B, or 245, (2) *of any decision or action of the Attorney General which is specified to be in the discretion of the Attorney General* (except a discretionary judgment whether to grant asylum as described in section 242(b)).

H.R. Rep. No. 104-828, at 219 (emphasis added).

Thus, the key report offered to those who voted on IIRIRA did not include any limits on the phrase "specified to be in the discretion of the Attorney General." Rather, the report announced only that the bill would strip courts of jurisdiction to review *any* decision specified as discretionary, making no mention of the *source* of that specification—statutory, regulatory, or otherwise. In light of this language, it appears that the enacting Congress intended that Section 1252(a)(2)(B)(ii)'s sweeping jurisdictional bar would include *every* Attorney General decision specified to be discretionary, regardless of the location of the specification. Failure to adhere to this reading would contravene the plain language of the

section and frustrate the intent of the enacting Congress.

### C. The History Of Motions To Reopen Further Supports Reading Section 1252(a)(2)(B)(ii) To Reach Those Motions.

Finally, by the time Congress enacted IIRIRA in September 1996, motions to reopen had been left to the Attorney General's discretion for almost a century. And just a few months earlier, the Attorney General had promulgated a regulation explicitly confirming that discretion. There is therefore every reason to presume that when Congress enacted Section 1252(a)(2)(B)(ii), it expected exactly the result the Seventh Circuit reached in this case.

*Common law history*: As this Court recently noted, "[t]he reopening of a case by the immigration authorities for the introduction of further evidence was treated [in 1916], as it is now, as a matter for the exercise of their discretion; where the alien was given a full opportunity to testify and to present all witnesses and documentary evidence at the original hearing, judicial interference was deemed unwarranted." *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008) (internal quotation marks omitted); see also, *e.g.*, *Wong Shong Been* v. *Proctor*, 79 F.2d 881, 883 (9th Cir. 1935) (emphasizing that "[t]he reopening of a case by the immigration authorities for the introduction of further evidence" was "a matter for the exercise of their discretion," and holding that judicial interference was unwarranted); *Chew Hoy Quong* v. *White*, 244 F. 749 (9th Cir. 1917); *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916); Resp. Br. 32 (recognizing this lengthy history).

More recent cases not only recognize the Attorney General's discretion in this area, but emphasize that his discretion is quite broad. See *Doherty*, 502 U.S. at 323 (noting that a regulatory provision promulgated in 1987 "requires that under certain circumstances a motion to reopen be denied, but does not specify the conditions under which it shall be granted," and finding that "[t]he granting of a motion to reopen is thus discretionary and the Attorney General has broad discretion to grant or deny such motions" (internal citation and quotation marks omitted)); see also *Abudu*, 485 U.S. at 96, 110 (confirming "the BIA's broad discretion in considering motions to reopen" and noting that "the reasons for giving deference to agency decisions on petitions for reopening . . . in other administrative contexts apply with even greater force in the INS context"); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (noting that the granting of the motion to reopen is "entirely within BIA's discretion").

*Regulatory history*: The regulatory history of motions to reopen accords with this common law history and confirms that the Congress that passed IIRIRA should have been well aware of the Attorney General's discretion over those motions. The Attorney General issued regulations governing motions to reopen as early as 1941, see 6 Fed. Reg. 68, 71-72 (1941), and by the late 1950s he had set forth the discretionary scheme that the United States acknowledges existed with "substantially the same" contours from that time forward. Resp. Br. 32; 23 Fed. Reg. at 9118-19 (promulgating original version of what is now Regulation 1003.2). Moreover, just months before Congress enacted IIRIRA, the Attorney General had refined this scheme to specify

even more plainly what had long been clear to all concerned: a motion to reopen filed with the Board is "within the [Board's] discretion." 61 Fed. Reg. at 18,904. When Congress voted on IIRIRA, therefore, it was abundantly clear that motions to reopen are subject to the broad discretion of the Attorney General and his agents.

In determining the meaning of statutory text, this Court has "endorsed the presumption that Congress was thoroughly familiar with contemporary law when it enacted" the provision in question. *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 362 n.3 (2006) (internal quotation marks omitted). Specifically, the Court presumes that when Congress returns to a statutory scheme like the INA, legislators are aware of the administrative precedent interpreting that scheme and are familiar with the ways key words and phrases have been used. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (recognizing Congress is aware of pre-existing regulations and their interpretations); see also *Beck* v. *Prupis*, 529 U.S. 494, 501, 504 (2000) (noting that when Congress uses widely accepted terms, "it mean[s] to adopt" the "well-established" principles related to those terms); *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998) (Congress's repetition of a well-established term implies it is using the term with awareness of pre-existing uses).

Thus, when Congress came to the table to devise a plan for "more aggressively . . . expedit[ing] the removal of illegal aliens from the United States," Resp. Br. 34, it was presumably aware of the existing regulations governing motions to reopen removal proceedings, and of the almost century-long judicial practice of recognizing the Attorney General's discretion over those motions. Likewise, when the

drafters of Section 1252(a)(2)(B)(ii) chose to preclude review of "any" decision made subject to the Attorney General's discretion, they were presumably aware of the long-held regulatory understanding—recently made explicit by the addition of new regulatory language—that "whether to grant a motion to reopen is entrusted to the Board's discretion." Resp. Br. 18. And when the conferees reported, in the document on which we presume their voting colleagues relied, that the proposed jurisdictional bar would apply to "any decision or action of the Attorney General which is specified to be in the discretion of the Attorney General," H.R. Rep. No. 104-828, at 219, the Members of Congress presumably knew that this description extended to the disposition of motions to reopen.

All told, reading "under this subchapter" to include decisions and actions made discretionary by a regulation promulgated under the subchapter is not only "most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it)," but also "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which . . . we assume Congress always has in mind." *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

## III. REGULATION 1003.2 SPECIFIES ATTORNEY GENERAL DISCRETION OVER THE DISPOSITION OF MOTIONS TO REOPEN REMOVAL PROCEEDINGS AND, AS SUCH, TRIGGERS SECTION 1252(a)(2)(B)(ii).

This interpretation of Section 1252(a)(2)(B)(ii)'s text, purpose, and history raises three subsidiary questions for the Court: (1) whether Regulation 1003.2, which clearly specifies that discretion over the disposition of motions to reopen lies with the Attorney General, was promulgated "under" Title 8, Chapter 12, Subchapter II of the United States Code; (2) if so, whether the regulation's specification of discretion is not binding on the courts because it is constitutionally suspect, "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the [INA]," *United States* v. *Mead Corp.*, 533 U.S. 218, 227 & n.6 (2001); and finally, (3) if the regulatory specification is procedurally and legally sound, whether there is any reason for this Court nevertheless to defer to the Attorney General's recently adopted litigating position that the specification fails to accomplish its stated purpose of committing motions to reopen to his discretion.

The answers to these questions are quite straightforward: (1) the 1003.2 Amendments, which added the discretionary language to Regulation 1003.2, were promulgated under the relevant subchapter; (2) the amendments were "properly promulgated, substantive agency regulations," and they present no constitutional difficulty, and thus Regulation 1003.2's specification of discretion "ha[s] the force and effect of law," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295 (1979) (internal quotation marks

omitted); and finally, (3) no deference is due to the Attorney General's litigating position that the amended version of Regulation 1003.2 does not mean what it plainly says. If the Attorney General wishes to repudiate the jurisdictional consequences of his office's regulation, his avenues of recourse are to amend the regulation or to encourage Congress to amend Section 1252(a)(2)(B)(ii).

### A. Regulation 1003.2 Unambiguously Specifies That The Disposition of Motions to Reopen Is Discretionary, And It Was Adopted "Under This Subchapter."

Regulation 1003.2 specifies that the Board has broad discretion over motions to reopen filed with it. Both the regulation itself and the later-added specification of discretion were duly promulgated "under" the relevant subchapter of the INA. On its face, therefore, Regulation 1003.2 triggers Section 1252(a)(2)(B)(ii).

#### *i. Regulation 1003.2 specifies that the Attorney General has discretion over motions to reopen.*

"In interpreting an administrative regulation, as in interpreting a statute, we must begin by examining the language of the provision at issue." *Am. Fed'n of State, County & Mun. Employees* v. *Am. Int'l Group, Inc.*, 462 F.3d 121, 125 (2d Cir. 2006) (internal quotation marks omitted)); see also *Engine Mfrs. Ass'n*, 541 U.S. at 252 (discussing statutory interpretation). Regulation 1003.2, which governs "[r]eopening or reconsideration before the Board of Immigration Appeals," 8 C.F.R. 1003.2, includes

language expressly confirming the long understanding, see Resp. Br. 32, that the Board has discretion to grant or deny motions to reopen: "The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board." 8 C.F.R. 1003.2(a).

This clearly specifies that an agent of the Attorney General—the Board—has discretion over the disposition of motions to reopen. See 8 U.S.C. 1103(g)(2) (permitting the Attorney General to delegate his authority to an agent); 8 C.F.R. 1003.1 (delegating authority to the Board). Indeed, the specification of discretion in Regulation 1003.2 ("within the discretion of," 8 C.F.R. 1003.2(a)) uses language all but identical to the language Congress later used in drafting Section 1252(a)(2)(B)(ii) ("in the discretion of," 8 U.S.C. 1252(a)(2)(B)(ii)). If, as argued above, the phrase "under this subchapter" in Section 1252(a)(2)(B)(ii) incorporates regulations, then the language of Regulation 1003.2 is plainly adequate to "specif[y]" that the disposition of motions to reopen is discretionary, and thus to trigger the section's jurisdiction-stripping effect. 8 U.S.C. 1252(a)(2)(B)(ii).

*ii. Regulation 1003.2 was issued "under this subchapter."*

The regulatory specification of discretion in Regulation 1003.2 also meets the other requirement of Section 1252(a)(2)(B)(ii): it was issued "under this subchapter"—that is, under Title 8, Chapter 12, Subchapter II of the United States Code.

The Attorney General added the language specifying discretion to Regulation 1003.2 on April

29, 1996, 61 Fed. Reg. at 18,904, and the addition took effect on July 1, 1996, *id.* at 18,900. In the version of the INA in effect on both of these dates, Congress had delegated to the Attorney General the authority to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter"—that is, under Title 8, Chapter 12. 8 U.S.C. 1103(a) (1994).[13] This authorizing language itself appears in Subchapter I of Chapter 12, but by its terms, the authorization extends to rules that the Attorney General deems necessary for carrying out his authority under both Subchapters I and II. And the title page of the 1003.2 Amendments indicates that Attorney General Reno intended the amendments to carry out her authority under then-Section 1252b of the INA, which was located in Subchapter II. 61 Fed. Reg. at 18,904 (indicating "Authority").

Section 1252b, which IIRIRA repealed, IIRIRA § 308(b)(6), 110 Stat. at 3009-615, pertained to "Deportation procedures," and included powers currently found in Section 1229a, including the power to issue orders of deportation "in absentia," and to rescind such orders "*upon a [qualifying] motion to reopen.*" 8 U.S.C. 1252b(c)(1), (c)(3) (1994) (emphasis added); 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added). Section 1252b mentioned only motions to reopen *in absentia* orders (not other removal orders), but the section's brief allusion to motions to reopen clearly presupposed that the Attorney General had in place a

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[13] In the current version of the authorizing provision, the Attorney General's powers are detailed in Section 1103(g)(2). 8 U.S.C. 1103(g)(2).

more general procedure for reviewing all motions to reopen removal proceedings.

In sum, then, Attorney General Reno asserted the Board's discretion over motions to reopen in regulatory language that she adopted pursuant to her delegated authority to "establish such regulations . . . as . . . necessary for carrying out," 8 U.S.C. 1103(a) (1994), the powers delegated in Section 1252b of Subchapter II. That is, she asserted discretion in language promulgated "under" Subchapter II.

### B. Regulation 1003.2 Is Binding On The Courts.

Because Regulation 1003.2, on its face, triggers the jurisdiction-stripping effect of Section 1252(a)(2)(B)(ii), the next task is to ascertain whether the regulation is binding on the courts.

As this Court has explained:

> When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron* [*U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)], and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute[,] . . . [a]ssuming . . ., of course, that the agency's exercise of authority is constitutional.

*Mead*, 533 U.S. at 227 & n.6. To evaluate the binding nature of the specification of discretion in Regulation 1003.2, therefore, the Court must assess (1) whether that specification fills a statutory gap that Congress left for the Attorney General to fill; (2) whether the

Attorney General's effort to fill that gap raises any constitutional concerns; and finally, (3) whether the same effort is "procedurally defective," unreasonable, or "manifestly contrary to the [INA]."

*i. Regulation 1003.2 and its specification of discretion fill a statutory gap that Congress left for the Attorney General to fill.*

The above discussion of Congress's delegation of regulatory authority in 8 U.S.C. 1103, *supra* p. 41, serves not only to prove that the discretionary language in Regulation 1003.2 was adopted "under this subchapter" for purposes of Section 1252(a)(2)(B)(ii), but also to establish that the same language was adopted pursuant to an "express delegation of authority to the agency to elucidate a specific provision of the [INA] by regulation," *Chevron*, 467 U.S. at 843-44. As of 1996, 8 U.S.C. 1103 delegated to the Attorney General the authority to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. 1103(a) (1994). Interpreting a virtually identical provision of the Communications Act in *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, this Court held that the relevant language broadly "delegate[s] to the agency authority to 'fill' a 'gap,' i.e., to apply [the statutory provisions in question] through regulations and orders with the force of law." 550 U.S. 45, 58 (2007) (quoting *Brand X*, 545 U.S. at 980-81).

In fact, that version of Section 1103 seemingly accomplished a broader delegation of power than the provision at issue in *Global Crossing*. The

Communications Act authorizes the Federal Communications Commission to "prescribe such rules and regulations as may be necessary *in the public interest* to carry out the provisions of this chapter." 47 U.S.C. 201(b) (emphasis added). In contrast, in 1996, Section 1103 authorized the Attorney General to adopt any regulations "he deems necessary for carrying out his authority," 8 U.S.C. 1103(a) (1994)—there was no suggestion that "the public interest" or any other limitation constrained the Attorney General in this task.

Not only does Section 1103 constitute a broad delegation of authority, but Regulation 1003.2 and its specification of discretion also fill evident gaps in the INA. Specifically, prior to IIRIRA, "no statutory provision" governed reopening of ordinary removal proceedings; "the authority for such motions derive[d] solely from regulations promulgated by the Attorney General." *Doherty*, 502 U.S. at 322. Meanwhile, also prior to IIRIRA, Section 1252b anticipated the possibility that an alien ordered removed in absentia could file a motion to reopen his removal proceeding, but that section omitted essential details, including the procedure for filing and review of such a motion. 8 U.S.C. 1252b (1994). Section 1252b did not, for example, specify the form a motion to reopen should take, the information it should include, or the standard under which it would be reviewed. 8 U.S.C. 1252b(c)(3) (1994). Finally, although the INA now expressly provides for the filing of motions to reopen in absentia and ordinary removal proceedings, the relevant sections still say nothing about the form and content of those motions, nor about the standard under which immigration officials will review them. See 8 U.S.C. 1229a(b)(5)(C) (motions to reopen in

absentia removal orders); 8 U.S.C. 1229a(c)(7) (all other motions to reopen).

Regulation 1003.2 fills in all of the necessary specifics for motions to reopen filed with the Board, explaining, among other things, that such motions must be in writing, 8 C.F.R. 1003.2(a); that they must "state the new facts that will be proven at a hearing to be held if the motion is granted," 8 C.F.R. 1003.2(c)(1); that they must be "supported by affidavits or other evidentiary material," 8 C.F.R. 1003.2(c)(1); and that the Board has discretion to review the motions, including the discretion "to deny a motion . . . even if the party moving has made out a *prima facie* case for relief," 8 C.F.R. 1003.2(a). Accordingly, Regulation 1003.2 and its specification of discretion pass the first test of binding effect—they represent an exercise of the Attorney General's statutorily delegated authority to fill gaps in the INA.

*ii. Regulation 1003.2 raises no relevant constitutional concerns.*

Two possible constitutional objections to Regulation 1003.2 and its specification of discretion might be raised, but neither is relevant here. First, if the regulation triggered Section 1252(a)(2)(B)(ii) in a way that stripped the federal courts of jurisdiction over constitutional claims raised in motions to reopen, that result could itself raise constitutional questions. See *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (discussing the jurisdiction-stripping provisions of IIRIRA). But the regulation cannot have that effect: Section 1252(a)(2)(D) limits the reach of Section 1252(a)(2)(B)(ii), providing that "[n]othing . . . in any . . . provision of [the INA] which limits or eliminates judicial review, shall be construed as

precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." 8 U.S.C. 1252(a)(2)(D).

Moreover, if the Board were to ignore a "potentially dispositive issue" in its review of a motion to reopen, the reviewing court potentially could, as the Seventh Circuit suggests, treat that mistake as an "error of law that would allow review under [Section] 1252(a)(2)(D)." Pet. App. 11a. Under that interpretation, Section 1252(a)(2)(B)(ii) would operate to strip courts of jurisdiction in only that narrow set of cases (including this case) in which the Board denies a motion to reopen for purely fact-based and at least cursorily explicated reasons. Here, the Court of Appeals ruled that Petitioner did not "advance[] any 'constitutional claims or questions of law,'" *id.* at 10a, and as the United States points out, Petitioner "did not seek review of [that] ruling," so "no question concerning the scope of Section 1252(a)(2)(D) is before the Court," Resp. Br. 17-18 n.9.

Second, it might be suggested that the Attorney General may not constitutionally claim unreviewable discretion over the disposition of motions to reopen.[14]

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[14] Notably, neither Petitioner nor any of his Amici claims, and the facts do not suggest, that depriving Petitioner of judicial review here would violate his rights under the Due Process Clause. More generally, Congress itself plainly could curtail court jurisdiction over fact-based petitions to reopen without raising due process concerns. The only possible question here, therefore, is whether Congress may delegate to the Attorney General the authority to define which issues are "discretionary" when that definition implicates court jurisdiction.

Congress plainly has authority to circumscribe federal courts' jurisdiction to review the discretionary, fact-based decisions of executive officials. See generally, *e.g.*, 5 U.S.C. 701(a)(2) (proscribing review of "agency action . . . committed to agency discretion by law"); *Heckler* v. *Chaney*, 470 U.S. 821, 834-35 (1985) (construing 5 U.S.C. 701(a)(2)); see also *Dalton* v. *Specter*, 511 U.S. 462, 477 (1994) ("The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute."). But it might be argued here that Congress may not circumscribe courts' authority to review discretionary agency decisions and then delegate to agency officials the corresponding line-drawing exercise of determining which decisions are in the "discretionary" category. Judge Cudahy adverted to this issue in dissent below, when he argued that the majority's opinion would "giv[e] the executive branch the authority to insulate its decisions from judicial review where there is no clear indication in the statute that Congress intended to strip us of our jurisdiction." Pet. App. 16a (Cudahy, J., dissenting).[15]

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[15] A recent decision of this Court in the very different context of prison reform litigation suggests that this is not a concern. See *Woodford* v. *Ngo*, 548 U.S. 81, 87, 93 (2006) (holding that an inmate in the California state prison system was barred from litigating his § 1983 claims in federal court because he missed a fifteen-day prison grievance deadline—and thus, impliedly, that prison officials may constitutionally issue procedural rules with jurisdictional consequences); Giovanna

In this case, however, Congress did not abdicate its authority to determine the limits of court jurisdiction, and the Attorney General did not overreach. Consider the timing: when Congress enacted Section 1252(a)(2)(B)(ii) in September 1996, it did so against the backdrop of an almost century-long understanding that the Attorney General has discretion over motions to reopen. See *supra* p. 34; Resp. Br. 32. Moreover, only a few months earlier, in April 1996, the Attorney General had added an express specification of discretion to Regulation 1003.2. See *supra* p. 7. Thus, *Congress* did the work of circumscribing court jurisdiction; the Attorney General merely specified as discretionary a class of decisions long understood to be so. *Cf. Cuomo* v. *Clearing House Ass'n*, 129 S. Ct. 2710, 2721 (2009) (noting that the term "visitorial powers" in the National Bank Act "define[s] and thereby limit[s] the category of action reserved to the Federal Government and forbidden to the States," and therefore, when the Office of the Comptroller of the Currency later interprets the term, the Office "necessarily declares the pre-emptive scope of the [Act]" (internal quotation marks omitted)).

Petitioner has given the Court no reason to believe that the Attorney General will, in the future, claim discretion over a broader or inappropriate range of functions. In this case, therefore, the question is not whether Congress may constitutionally delegate its authority to determine

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Shay & Johanna Kalb, *More Stories of Jurisdiction Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 Cardozo L. Rev. 291, 302-08 (2007) (discussing *Ngo*).

federal court jurisdiction. Here, the Court need only determine whether *Congress*, by legislating in light of an existing regulatory understanding that the Attorney General has discretion over the disposition of motions to reopen, both had the constitutional authority to limit, and did in fact limit, court authority to review the denial of such motions. The answer to the first question is indisputably yes; the answer to the second is the issue of the day.

### *iii. Regulation 1003.2 is not procedurally defective, nor unreasonable, nor manifestly contrary to the INA.*

Neither Petitioner nor his Amici have argued that Regulation 1003.2 itself or the 1003.2 Amendments that added the specification of discretion are procedurally defective, arbitrary and capricious, or contrary to law. Moreover, the six-year "catch-all" statute of limitations has run for challenges to either the rule or the amendments. 28 U.S.C. 2401(a); see also *Sai Kwan Wong* v. *Doar*, 571 F.3d 247, 263 (2d Cir. 2009) (concluding that "[i]n the case of a claimed procedural error . . . the [catch-all] statute of limitations begins to run . . . upon issuance of the regulation"); *Nagahi* v. *INS*, 219 F.3d 1166, 1171 (10th Cir. 2000) (noting, in a challenge to a regulation limiting the time for appealing the denial of a naturalization application, that "[i]n the absence of a specific statutory limitations period, a civil action against the United States under the [Administrative Procedure Act] is subject to the six year limitations period found in 28 U.S.C. § 2401(a)");

In any event, perusal of the rulemaking record for the 1003.2 Amendments suggests no cause for

concern. With respect to procedure, the amendments progressed in orderly fashion through the notice, comment, and concise general statement requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. Specifically, the rulemaking progressed from a proposed rule issued in June 1994, 59 Fed. Reg. 29,386 (1994), through a second proposed rule issued in May 1995, 60 Fed. Reg. 24,573 (1995), to a final rule issued in April 1996, 61 Fed. Reg. 18,900 (1996). The first proposal ushered in a sixty-day comment period, 59 Fed. Reg. at 29,386, and the second a thirty-day comment period, 60 Fed. Reg. at 24,573—sufficient, alone or in combination, to permit interested parties to submit their views. *Cf. Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992) ("Although the APA mandates no minimum comment period, some window of time, usually thirty days or more, is . . . allowed for . . . comment."). Further, the proposals and the final rule included the same discretionary language—"The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section"—so there can be no suggestion that the proposals failed to give interested parties notice of the possibility that the Attorney General would expressly specify his discretion over motions to reopen filed with the Board. 59 Fed. Reg. at 29,387; 60 Fed. Reg. at 24,575; 61 Fed. Reg. at 18,904. Finally, the Amendments' drafters devoted four Federal Register pages to a concise general statement that explained the provisions of the six-page rule and responded to the seventy-one comments received during the two comment periods. 61 Fed. Reg. at 18,900-04.

With respect to content, too, the specification of discretion in the 1003.2 Amendments appears unexceptionable. The specification served merely to confirm the "well-settled" understanding that "whether to grant a motion to reopen is entrusted to the Board's discretion." Resp. Br. 18. There was therefore no occasion for the final rule to provide the sort of lengthy explanation that might be necessary to support a reversal of policy. See, *e.g.*, *Brand X*, 545 U.S. at 981 (recognizing that "[u]nexplained inconsistency [may be] a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act").

Finally, far from contravening the INA, the 1003.2 Amendments were promulgated "to implement the directives of section 545 of the Immigration Act of 1990," which established "[b]oth time and number limitations on motions to reopen." 59 Fed. Reg. at 29,386. The Amendments specified procedures for the filing of such motions, providing only limited exceptions to the time and number limitations, in accordance with "the intent of Congress to streamline the deportation proceedings of aliens in the United States." *Id.*

In summary, both Regulation 1003.2 and the 1003.2 Amendments fill gaps in the governing statute; they were issued pursuant to properly delegated rulemaking authority; they raise no relevant constitutional concerns; and the time for challenges to their procedural history and content has long passed. Moreover, neither the amendments' procedural history nor their content is manifestly unlawful. Accordingly, Regulation 1003.2 as amended is binding on this Court. *Mead*, 533 U.S. at 227.

### C. The Court Need Not Defer To The Attorney General's Contrary Litigating Position.

The final issue before the Court is how much weight, if any, to give to the Attorney General's current assertion that Regulation 1003.2 does *not* trigger the jurisdiction-stripping effect of Section 1252(a)(2)(B)(ii). The Court regularly defers to an agency's interpretation of the statute it is charged with administering, *Chevron*, 467 U.S. at 843-44, and also to the agency's reading of its own regulations, *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 672 (2007). Such deference is not appropriate here, however, for two reasons. First, the agency's assertion is a litigating position "wholly unsupported by regulations, rulings, or administrative practice." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Second, with respect to the question before the Court, the statute and regulation are unambiguous.

On the first point, the Attorney General's present view of the interplay between Section 1252(a)(2)(B)(ii) and Regulation 1003.2 is quite new. In cases before 2008, the United States repeatedly read the relevant statutory and regulatory language as the Seventh Circuit did, to strip courts of jurisdiction to review Board denials of motions to reopen. See, *e.g.*, Brief for Respondent at 8, in *Onyinkwa* v. *Ashcroft*, 376 F.3d 797 (8th Cir. 2004) ("Where a regulation that implements a statute in subchapter II confers discretion, section 1252(a)(2)(B)(ii) strips a court of appeals of jurisdiction over the discretionary decision governed by the regulation."); Brief for Respondent at 10, in

*Yerkovich* v. *Ashcroft*, 381 F.3d 990 (10th Cir. 2004) ("Where the regulation that implements a statute in subchapter II confers discretion, Section 1252(a)(2)(B)(ii) acts to strip the court of appeals of jurisdiction over the discretionary decision governed by the regulation." (citing *CDI Info. Servs.* v. *Reno*, 278 F.3d 616, 619 (6th Cir. 2002))).

In fact, it is possible to determine approximately when the Attorney General's view changed: the initial Brief for Respondent in *Jahjaga* v. *Attorney General* argued *against* court jurisdiction to review a motion to reopen, but when the court sought supplemental briefing on the issue, the Government changed its mind. 512 F.3d 80, 83 n.1 (3rd Cir. 2008) ("Prior to argument of these two appeals, we had asked counsel for the Government and the parties to address the question[] of jurisdiction .... [T]he Government withdrew its earlier argument that we could not review the BIA's decision because of its discretionary nature [and] conceded that we possess jurisdiction to review the issues on these appeals."). This switch-in-time may not itself be dispositive of the deference question, see *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007), but in the absence of a duly promulgated rule or other "articulated" agency "interpretation" of Section 1252(a)(2)(B)(ii) and Regulation 1003.2, this Court owes no deference to the United States' shifting litigating position, *Bowen*, 488 U.S. at 212; see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (internal quotation marks omitted)).

Moreover, no deference is owed here because the text of Section 1252(a)(2)(B)(ii) and Regulation 1003.2 admits of only one interpretation on the issue before the Court. As discussed above, *supra* pp. 14-21, Section 1252(a)(2)(B)(ii) unambiguously extends to decisions and actions "specified" by the INA *or* by regulation issued thereunder "to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Thus, with respect to the section's reach, "the intent of Congress is clear, [and] that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The INA leaves room for the Attorney General to identify *whether* certain issues are discretionary, but it leaves no room for him to curtail the jurisdictional effect of designating an issue as discretionary. *Cf. Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009) (Stevens, J., concurring in part and dissenting in part) ("The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice.").

Regulation 1003.2 is similarly clear—it specifies in so many words that the decision whether to grant or deny a motion to reopen is "within the discretion" of the Attorney General. 8 C.F.R. 1003.2(a). There is simply no way to interpret that language as stopping short of triggering Section 1252(a)(2)(B)(ii)'s jurisdictional bar. The bar extends to decisions specified to be in the Attorney General's discretion; Regulation 1003.2 so specifies with respect to the disposition of motions to reopen filed with the Board. To the extent that the Attorney General's present

contrary view of the regulation's import is based on a different understanding of the regulatory text, that understanding is "inconsistent with the regulation" and merits no deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted).

The Attorney General may now regret the jurisdictional consequences of the clear specification of discretion that his office added to Regulation 1003.2 in 1996. There may be policy arguments for allowing courts to review the Board's denial of motions to reopen. But it is a well-settled—and jurisprudentially sound—principle of administrative law that an agency must "abide by the regulations it promulgates." *Sameena Inc.* v. *U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (citing *Vitarelli* v. *Seaton*, 359 U.S. 535, 545 (1959); *Service* v. *Dulles*, 354 U.S. 363, 372 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-67 (1954)). That principle has its most salutary effect in situations in which an agency has been generous in granting parties procedural safeguards that go beyond those mandated by statute. In that situation, "[a]n agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice." *Sameena*, 147 F.3d at 1153 (internal quotation marks omitted). Here too, though, the failure to enforce the plain language of Regulation 1003.2 would have adverse consequences for some parties before the Board. In concert with Section 1252(a)(2)(B)(ii), Regulation 1003.2's specification of discretion and its other limits on the filing of dilatory or repetitious motions to reopen serve not only to expedite the removal of some aliens, in accordance with Congress's intent in the Immigration Act of 1990, see *supra* pp. 7, 51, but also

to ensure that the Board's limited resources are focused not on defending denials of motions to reopen, but on reaching the right result in removal proceedings from the outset.

## CONCLUSION

For the foregoing reasons, this Court should affirm the Seventh Circuit's determination that 8 U.S.C. 1252(a)(2)(B)(ii) bars courts from reviewing the Board's discretionary denial of Petitioner's motion to reopen his removal proceeding.

Respectfully submitted,

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# APPENDIX A

## Sample United States Code language referring to regulations as "under" statutes

### TITLE 8: Aliens and Nationality

8 U.S.C. 1101(a)(9) ("regulations prescribed under authority contained in this chapter")
8 U.S.C. 1103(a)(4) ("regulations issued thereunder")
8 U.S.C. 1103(a)(6) ("regulations issued thereunder")
8 U.S.C. 1103(a)(10) ("regulations issued thereunder")
8 U.S.C. 1104(a) ("regulations issued thereunder")
8 U.S.C. 1182(a)(7)(A)(i)(I) ("regulations issued by the Attorney General under section 1181(a)")
8 U.S.C. 1201(a)(1) ("regulations issued thereunder")
8 U.S.C. 1201(g) ("the regulations issued thereunder")
8 U.S.C. 1204 ("regulations prescribed under this chapter")
8 U.S.C. 1224 ("any regulation made under this section")
8 U.S.C. 1229c(e) ("any regulation issued under this subsection")
8 U.S.C. 1255a(g)(3) ("Regulations prescribed under this section")
8 U.S.C. 1323(a)(1) ("regulations issued thereunder")
8 U.S.C. 1324c(e)(2) ("regulations promulgated thereunder")
8 U.S.C. 1356(f)(3) ("Regulations issued by the Attorney General under this subsection")

## OTHER TITLES

### TITLE 2: The Congress

2 U.S.C. 167g ("any regulation prescribed under section 167f of this title")
2 U.S.C. 434(a)(11)(C) ("promulgating a regulation under this paragraph")
2 U.S.C. 438(d)(1) ("any rule, regulation, or form under this section")
2 U.S.C. 476(e)(1) ("section 5731 ... and regulations promulgated thereunder")
2 U.S.C. 1312(d)(2) ("regulations issued under paragraph (1)")
2 U.S.C. 1313(a)(2) ("in regulations under subsection (c)")
2 U.S.C. 1313(c)(2) ("regulations issued under paragraph (1)")
2 U.S.C. 1382(b)(4) ("regulations under section 1384(a)(2)(B)(i)")
2 U.S.C. 1409 ("a regulation issued under this chapter")
2 U.S.C. 1961(a) ("regulations promulgated under section 1969 of this title")
2 U.S.C. 1977(b)(2) ("regulations prescribed under this subsection")
2 U.S.C. 2201("regulations under paragraph (1)")

### TITLE 3: The President

3 U.S.C. 411(d)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 412(c)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 413(a)(2) ("regulations under subsection (c)")

3 U.S.C. 413(c)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 414(c)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 415(c)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 416(c)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 421(d)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 425(d)(2) ("regulations issued under paragraph (1)")
3 U.S.C. 431(c)(2) ("regulations issued under paragraph (1)")

**TITLE 5: Government Organization, Employees**

5 U.S.C. 552(a)(6)(D)(ii) ("Regulations under this subparagraph")
5 U.S.C. 552(a)(6)(E)(ii) ("regulations under this subparagraph")
5 U.S.C. 2302(e)(1)(H) ("Any regulation prescribed under subsection (b) or (c)")
5 U.S.C. 3304(c)(2) ("regulations prescribed under this title")
5 U.S.C. 4312(c)(3) ("regulations prescribed under section 4315")
5 U.S.C. 5307(d)(4) ("regulations under this paragraph")
5 U.S.C. 5550a(c) ("Regulations under this section")
5 U.S.C. 6387 ("regulations prescribed under this subchapter")
5 U.S.C. 8905(d) ("regulations under this chapter")
5 U.S.C. 8959 ("regulation issued thereunder")

5 U.S.C. 9902(g)(4) ("regulations promulgated under this section")

**TITLE 6: Domestic Security**

6 U.S.C. 394(b) ("regulations prescribed under subsection (a)")
6 U.S.C. 792(b) ("regulations promulgated under subsection (a)")
6 U.S.C. 794(b) ("regulations promulgated under subsection (a)")
6 U.S.C. 943(d) ("regulations under section 343(a)")
6 U.S.C. 1137(b) ("regulations under subsection (a)")
6 U.S.C. 1137(d)(4) ("regulations issued under subsection (a)")
6 U.S.C. 1162(c) ("regulations under subsection (a)")
6 U.S.C. 1167(b) ("regulations under subsection (a)")
6 U.S.C. 1167(d)(4) ("regulations issued under subsection (a)")
6 U.S.C. 1184(b) ("regulations under subsection (a)")
6 U.S.C. 1184(d)(4) ("regulations issued under subsection (a)")
6 U.S.C. 1204(c) ("regulations under subsection (a)")

**TITLE 7: Agriculture**

7 U.S.C. 6f(c)(9) ("regulations issued under this subsection")
7 U.S.C. 242(j)(2) ("regulations promulgated under this chapter")
7 U.S.C. 473d ("regulations under this chapter")
7 U.S.C. 2032(a)(2)(B) ("regulations issued under this chapter")
7 U.S.C. 2904(11) ("regulations under this chapter")

7 U.S.C. 4002(h)(2) ("any regulation prescribed under this section")
7 U.S.C. 4317 ("regulation issued under this chapter")
7 U.S.C. 4403(3) ("regulations issued thereunder")
7 U.S.C. 4815(a)(1) ("regulation issued under this chapter")
7 U.S.C. 7712(b) ("regulations under this section")
7 U.S.C. 7719(d)(2) ("regulations promulgated under the Clean Air Act")
7 U.S.C. 8317 ("a regulation under section 8303(b)")

**TITLE 10: Armed Forces**

10 U.S.C. 130(b) ("Regulations under this section")
10 U.S.C. 503(b)(5) ("Regulations prescribed under this subsection")
10 U.S.C. 628(j)(2) ("the regulations under paragraph (1)")
10 U.S.C. 1107(f)(4)(A) ("regulations promulgated under section 505(i)")
10 U.S.C. 1448(a)(6)(C)(iii) ("regulations under section 1455 of this title")
10 U.S.C. 1482a(b) ("Regulations under this subsection")
10 U.S.C. 1610(e) ("Regulations under this section")
10 U.S.C. 2507(a) ("regulations issued under this chapter")
10 U.S.C. 2572(d)(1) ("regulations under section 121 of title 40")
10 U.S.C. 2784(b) ("Regulations under subsection (a)")
10 U.S.C. 4543(a) ("Regulations under section 2208(h) of this title")

10 U.S.C. 7542 ("regulations under section 121 of title 40")
10 U.S.C. 14312(a)(2) ("Regulations under this section")

**TITLE 12: Banks and Banking**

12 U.S.C. 248(p) ("regulations promulgated hereunder")
12 U.S.C. 611a ("regulations under this section")
12 U.S.C. 1426(a)(4)(A) ("this chapter and the regulations issued hereunder")
12 U.S.C. 1426a(f)(2) ("regulations under this section")
12 U.S.C. 1464(d)(1)(A) ("regulations prescribed hereunder")
12 U.S.C. 1786(w)(3)(B) ("regulations under this paragraph")
12 U.S.C. 1822(f)(6) ("regulations under this subsection")
12 U.S.C. 1954 ("any regulation under this chapter")
12 U.S.C. 1956 ("any regulation under this chapter")
12 U.S.C. 2275a(b)(2) ("regulations under such provision")
12 U.S.C. 2606(b) ("regulations under section 2617(a)")
12 U.S.C. 4009(d) ("prescribe regulations under this chapter")
12 U.S.C. 4309(c) ("regulations under this chapter")

**TITLE 14: Coast Guard**

14 U.S.C. 85 ("regulations prescribed hereunder")

14 U.S.C. 92(d) ("regulations under subtitle I of title 40")
14 U.S.C. 93(a)(8) ("regulations under subtitle I of title 40")
14 U.S.C. 641(a) ("regulations under subtitle I of title 40")

**TITLE 15: Commerce and Trade**

15 U.S.C. 57a(f)(6) ("regulations under this subsection")
15 U.S.C. 78o-5(b)(3)(B) ("a rule or regulation under this paragraph")
15 U.S.C. 687c(a) ("rule or regulation under this chapter")
15 U.S.C. 1262(f) ("a regulation under section 1261(q)(1)")
15 U.S.C. 2056a(d)(2)(G) ("regulations under this section")
15 U.S.C. 2104 ("regulations under section 2101(c)")
15 U.S.C. 2512(c)(3) ("regulations under paragraph (2)")
15 U.S.C. §2643(b) ("regulations under this subchapter")
15 U.S.C. 4404(b)(1) ("Regulations issued . . . under section 4402 of this title")
15 U.S.C. 5712(f) ("or regulation under this chapter")
15 U.S.C. 6758(d)(2)(B) ("regulations under this subchapter")

**TITLE 16: Conservation**

16 U.S.C. 410jjj-2(b) ("any regulations promulgated under this subsection")

16 U.S.C. 460gg-3(a) ("regulations issued hereunder")
16 U.S.C. 470cc(a) ("regulations under this chapter")
16 U.S.C. 545b(d)(5)(C) ("any regulation under this subsection")
16 U.S.C. 971d(c)(1)(C) ("Regulations promulgated under this paragraph")
16 U.S.C. 1373(d) ("regulations under this section")
16 U.S.C. 1434(b)(1) ("regulations issued under this Act")
16 U.S.C. 1883(b) ("regulation under this Act")
16 U.S.C. 2506(a) ("regulations under this chapter")
16 U.S.C. 4914(b) ("regulations promulgated under this section")
16 U.S.C. 5006(a) ("regulations issued under this chapter")
16 U.S.C. 6905(d)(2) ("regulation under this Act")
16 U.S.C. 7009(a)(1) ("regulations issued under this chapter")

**TITLE 17: Copyrights**

17 U.S.C. 407(e)(4) ("regulations prescribed under clauses (1) or (2) of this subsection")
17 U.S.C. 701(e) ("section 706(b) and the regulations issued thereunder")
17 U.S.C. 802(f)(2)(B) ("regulations under subsection (h)")
17 U.S.C. 803(b)(6)(C) ("Regulations issued under subparagraph (A)")
17 U.S.C. 908(f) ("the regulations issued under this chapter")

## TITLE 18: Crimes and Criminal Procedure

18 U.S.C. 42(a)(5) ("regulations issued hereunder")
18 U.S.C. 175b(b)(1) ("regulations under subsection (b) or (c) ")
18 U.S.C. 842(g) ("regulations promulgated under section 847 of this title")
18 U.S.C. 923(g)(1)(A)(i) ("regulations under this chapter")
18 U.S.C. 926(a)(2) ("regulations issued under paragraph (1) of this subsection")
18 U.S.C. 1716C ("regulations prescribed under section 3014(c) of title 39")
18 U.S.C. 1960(b)(1)(B) ("regulations prescribed under such section")
18 U.S.C. 3662(d) ("regulations under this section")
18 U.S.C. 3771(f)(2) ("regulations promulgated under paragraph (1)")
18 U.S.C. 4013(b) ("the regulations issued under section 4006 of this title")
18 U.S.C. 4048(j) ("a proposed regulation under this section")

## TITLE 19: Customs Duties

19 U.S.C. 58c(e)(5)(E) ("regulations prescribed under subsection (g)(2)")
19 U.S.C. 81s ("any regulation under this chapter")
19 U.S.C. 1438 ("regulations issued thereunder")
19 U.S.C. 1481(a) ("regulations prescribed under this section")
19 U.S.C. 1486(a) ("regulations promulgated thereunder")
19 U.S.C. 1504(a)(1)(C) ("regulations issued under section 1505(a) of this title")

19 U.S.C 1641(d)(1)(C) ("regulations issued under any such provision")
19 U.S.C. 1644a(b)(2) ("a regulation under paragraph (1)(A)–(D)")
19 U.S.C. 2253(g)(3) ("Regulations prescribed under this subsection")
19 U.S.C. 2320(b) ("a regulation under subsection (a)")
19 U.S.C. 2451b(c) ("any regulations issued under this part")
19 U.S.C. 2581(a) ("Regulations prescribed under this subsection")

**TITLE 20: Education**

20 U.S.C. 107d–1(b) ("regulations issued thereunder")
20 U.S.C. 927(b) ("Any regulation under subsection (a)")
20 U.S.C. 954(k) ("regulations under this subchapter")
20 U.S.C. 1036(e)(3)(D) ("regulations under this subpart")
20 U.S.C. 1087-1(b)(3) ("regulations promulgated under this section")
20 U.S.C. 1091(e) ("regulations issued under this subchapter")
20 U.S.C. 1161g(d)(2) ("regulations under this section")
20 U.S.C. 2326(b)(5)(B) ("regulations under subchapter III")
20 U.S.C. 2398 ("regulations under this chapter")
20 U.S.C. 7014 ("regulations under this subchapter")
20 U.S.C. 7217b(b) ("regulations under this part")

## TITLE 21: Food and Drugs

21 U.S.C. 349(a) ("regulations under this chapter")
21 U.S.C. 360g(a)(1) ("a regulation under section 360c")
21 U.S.C. 376 ("regulations promulgated thereunder")
21 U.S.C. 384(c) ("regulations under subsection (b)")
21 U.S.C. 823(g)(2)(H)(i)(II) ("regulations under this paragraph")
21 U.S.C. 827(a)(1) ("the regulations prescribed under this section")
21 U.S.C. 841(c)(3) ("the regulations issued under that section")
21 U.S.C. 971(b)(2) ("regulations under this subsection")
21 U.S.C. 1034(a) ("the regulations promulgated under this chapter")

## TITLE 22: Foreign Relations and Intercourse

22 U.S.C. 277e ("regulations under the [Act]")
22 U.S.C. 2385a(c) ("regulations issued under this section")
22 U.S.C. 2386(c) ("regulations issued thereunder")
22 U.S.C. 2712(f)(2) ("regulations issued under this section")
22 U.S.C. 2776(a)(9) ("the regulations issued under section 2778 of this title")
22 U.S.C. 2778(b)(1)(A)(i) ("regulations issued under this section")
22 U.S.C. 2779(d)(1) ("regulations prescribed under this section")
22 U.S.C. 3104(b) ("regulations issued under this chapter")

22 U.S.C. 3657a(c) ("regulations prescribed under subsection (b)")
22 U.S.C. 3779(b)(3) ("regulations under this subsection")
22 U.S.C. 6004(e)(3)(A) ("regulations issued under section 5(b)")
22 U.S.C. 8123(b)(2)(H)(i) ("regulations promulgated under this chapter")

**TITLE 23: Highways**

23 U.S.C. 112(b)(3)(D) ("regulations under section 1307(c)")
23 U.S.C. 112(g)(2) ("regulations issued under paragraph (1)")
23 U.S.C. 139(c)(2) ("regulations under the [Act]")
23 U.S.C. 303(h) ("any regulation under this section")

**TITLE 25: Indians**

25 U.S.C. 190 ("regulations under the [Act]")
25 U.S.C. 450k(a)(1) ("regulations under this subchapter")
25 U.S.C. 450k(a)(2)(A) ("The regulations promulgated under this subchapter")
25 U.S.C. 458aaa-16(a)(3) ("regulations under paragraph (1)")
25 U.S.C. 458aaa-16(c) ("regulations promulgated under this section")
25 U.S.C. 2414(1) ("administrative regulations promulgated thereunder")
25 U.S.C. 2713(a)(3) ("regulations prescribed under this chapter")

25 U.S.C. 3504(e)(2)(B)(iii)(XIII) ("regulations promulgated under paragraph (8)")
25 U.S.C. 4115(a)(2)(B) ("regulations issued under this paragraph")
25 U.S.C. 4116(a)(2)(B) ("regulations under subsection (b)")
25 U.S.C. 4226(a)(2)(B) ("regulations issued under this paragraph")

**TITLE 26: Internal Revenue Code**

26 U.S.C. 170(e)(3)(A)(iv) ("regulations promulgated thereunder")
26 U.S.C. 385(b) ("regulations prescribed under this section")
26 U.S.C. 414 ("regulations under this subsection").
26 U.S.C. 417(f)(7) ("regulations under this section")
26 U.S.C. 529(f) ("regulations under chapters 11, 12, and 13 of this title")
26 U.S.C. 1402(g)(1) ("regulations under this chapter")
26 U.S.C. 3121(b)(5)(H)(ii) ("regulations issued under section 860")
26 U.S.C. 5713(a) ("regulations issued thereunder")
26 U.S.C. 6057(f)(2) ("regulations prescribed under this subsection")
26 U.S.C. 6674 ("regulations prescribed thereunder")
26 U.S.C. 7231 ("regulations prescribed under section 7001")

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28 U.S.C. 594(a)(8) ("regulations issued thereunder")

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29 U.S.C. 1811(b) ("any regulation under this chapter")
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33 U.S.C. 1322(o)(4)(B)(i) ("regulations under this paragraph")
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**TITLE 37: Pay and Allowances of the Uniformed Services**

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37 U.S.C. 302a(b)(1) ("regulations prescribed under section 303a(a) of this title")
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# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

AGRON KUCANA,

*Petitioner,*

*v.*

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF FOR LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix to this Brief are law professors who teach and write about statutory interpretation and the relationship between the federal courts and administrative agencies. Amici come together in this case because of their shared concern that the decision below is inconsistent with fundamental separation of powers values and risks setting a dangerous precedent with regard to agency control over judicial review of administrative action. Amici all agree that, for the reasons set forth in this brief, the decision below should be reversed.

## SUMMARY OF ARGUMENT

The availability of judicial review derives from both a long common law tradition and the structure of our Constitution. Thus, under longstanding principles of statutory interpretation and the strong presumption in favor of judicial reviewability, courts should not construe statutes to eliminate or restrict judicial review absent a clear statement of congressional intent to do so. Like numerous other clear statement requirements, this approach reflects respect for the separation of powers by ensuring that Congress acts in a deliberate and politically accountable manner before limiting courts' jurisdiction or otherwise altering the traditional

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

roles and powers of the separate branches of government.

Reading the jurisdiction-stripping provision in 8 U.S.C. § 1252(a)(2)(B)(ii) to preclude review over decisions of the Board of Immigration Appeals (BIA) denying motions to reopen is fundamentally inconsistent with these bedrock principles. Congress provided no clear statement that it intended to cut off judicial review of those decisions. To the contrary, Congress took care to provide that judicial review would be foreclosed only when Congress itself "specified" the agency's unreviewable discretion in designated immigration statutes. By overlooking the absence of any clear statement regarding motions to reopen, the decision below eliminated judicial review where Congress expressed no intent to do so, and thus undermined the institutional values that clear statement requirements are intended to preserve.

That the BIA's own implementing regulations declare its decisions on motions to reopen to be within the agency's discretion cannot supply the clear statement that is missing in the statute. It is Congress's intent that must be clear, not the agency's. By reading the statute to bar judicial review where the agency's discretion is "specified" only in its own regulations, and not in the statute itself, the court of appeals effectively delegated to the agency the authority—which the Constitution vests only in Congress—to decide the scope of the federal courts' jurisdiction. That approach undermines the same separation of powers principles that warrant the application of a clear statement requirement in the first place. This Court should therefore reverse the court of appeals' decision and reaffirm the importance of the presumption of reviewability and the need for a clear statement of congressional intent be-

fore assuming that Congress has precluded judicial review of agency action.

## ARGUMENT

### I. COURTS SHOULD NOT CONSTRUE STATUTES TO ELIMINATE OR RESTRICT JUDICIAL REVIEW UNLESS CONGRESS HAS CLEARLY STATED AN INTENT TO DO SO

#### A. Clear Statement Requirements Promote Important Separation Of Powers Values And Ensure That Congress Acts Deliberately And Openly When Redefining The Traditional Roles Of The Branches Of Government

It is a well-established practice of statutory construction that courts do not interpret legislation to redefine the traditional roles of or balance of power among the branches of government unless Congress has clearly stated that it intended to do so. That approach ensures that it is Congress, not the courts, that alters the traditional balance. Even where Congress's constitutional authority to act is not in doubt, such that canons of constitutional avoidance are not implicated, courts apply clear statement requirements out of respect for the separation of powers to ensure that Congress did not effect a significant change to the structure of government lightly, through inadvertence, or without transparency.

Courts and commentators have recognized the important institutional values that clear statement requirements serve. For example, when important structural principles are at stake, clear statements indicate that Congress has thought carefully about the effects of its actions. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("'In traditionally sensitive areas, ... the re-

quirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" (citations omitted)); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 631 (1992) (interpretive presumptions and clear statement requirements "can protect important constitutional values against accidental or undeliberated infringement"); Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 154 (1990) (arguing that interpretive canons encourage deliberate and accountable lawmaking).

Furthermore, requiring a clear statement of legislative intent assures that when Congress tips the balance of power, it does so in a transparent way, so that legislators may be held accountable to voters for their actions. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1399 (1953) ("The primary check on Congress is the political check—the votes of the people. If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate."); *see also* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546-547, 558-560 (1954).

Clear statement requirements also preserve the separation of powers by ensuring that it is Congress—not the judiciary—that makes the decision to disrupt the status quo. *See* Stuart Minor Benjamin & Ernest A. Young, *Tennis With the Net Down: Administrative Federalism Without Congress*, 57 Duke L.J. 2111, 2149

(2008) ("[T]he Court's employment of clear statement rules in a variety of contexts reflects the traditional—and in our view plainly correct—notion that *Congress* must make the critical decisions." (emphasis added)); Eskridge & Frickey, 45 Vand. L. Rev. at 631 (presumptions and clear statement rules "are necessary to assure that *the political branches* make the most important policy choices in our democracy" (emphasis added)).

Reflecting these purposes, this Court has looked for clear expressions of legislative intent in a wide variety of contexts to ensure that Congress has acted deliberately and transparently when disturbing traditional institutional roles. For example, the Court has cautioned that Congress cannot alter courts' longstanding prerogatives by "displac[ing] courts' traditional equitable authority absent the 'clearest command.'" *Miller* v. *French*, 530 U.S. 327, 340 (2000) (citation omitted). Similarly, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the Court has held that "textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]," and instead required "an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992).[2]

The same caution has marked the Court's approach when the balance of power between the federal and

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[2] *See also Nixon* v. *Fitzgerald*, 457 U.S. 731, 748 & n.27 (1982) (declining to find Congress has created a civil action for damages against the President absent a clear statement).

state governments is at stake. *See Gregory*, 501 U.S. at 460 (requiring Congress to speak clearly if it intends to "upset the usual constitutional balance of federal and state powers" by prescribing qualifications for state office; "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance'" (citation omitted)); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-239, 242-243 (1985) (because abrogation of States' Eleventh Amendment immunity disrupts the "'constitutionally mandated balance of power,'" courts should be "certain of Congress' intent," and "[t]he requirement that Congress unequivocally express this intention in the statutory language ensures such certainty" (citation omitted)); *cf. EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (requiring clear expression of congressional intent before applying U.S. law extraterritorially). These cases thus illustrate that clear statement requirements are imposed not to prevent Congress from acting, but rather to ensure that important structural changes do not occur through inadvertence or stealth. *See, e.g., Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869) (declining to "giv[e] to doubtful words the effect of withholding or abridging" the Court's appellate habeas corpus jurisdiction).

### B. A Clear Statement Is Similarly Required When Congress Alters Courts' Traditional Role By Eliminating Or Restricting Judicial Review Of Agency Action

The institutional values underlying courts' application of clear statement requirements when other aspects of the separation of powers are at stake apply with equal force when Congress eliminates or restricts judicial review of agency action. There is a long historical tradition of such reviewability. Courts are thus

loathe to assume that Congress intended to disturb that tradition by precluding judicial review without a clear indication of intent to do so.

Courts' power of judicial review of administrative action is rooted in Anglo-American legal history, dating back at least to the seventeenth century. *See* Louis L. Jaffe, *Judicial Control of Administrative Action* 329-334 (1965). The King's judges in England, for example, had authority to issue the prerogative writs to inferior officers, "order[ing] the officer to demonstrate the legality of his order or determination." *Id.* at 153. Reception of this tradition into American law is illustrated by *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902). There, the Postmaster General barred the plaintiff from conducting business through the mail on the ground that the plaintiff's advertisements were fraudulent. *Id.* at 98-99. The Postmaster General argued that his decision was "administrative" and therefore unreviewable by the court. *See id.* at 108-110. The Court rejected that argument and held that the delegation of authority to the Postmaster General "does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved." *Id.* at 108. Rather, "[t]he acts of all ... officers must be justified by some law, and in case an official violates the law ... *the courts generally have jurisdiction* to grant relief." *Id.* (emphasis added).

*McAnnulty* is the foundation in a line of cases that solidified what has become a bedrock principle: judicial review is presumed, unless Congress clearly says otherwise. *See Gegiow* v. *Uhl*, 239 U.S. 3, 8-10 (1915) (holding that immigration commissioner's decision reflected a misinterpretation of the law and noting that "[t]he courts are not forbidden *by the statute* to consider whether the reasons, when they are given, agree with

the requirements of the act" (emphasis added)); *Dismuke* v. *United States*, 297 U.S. 167, 172 (1936) (interpreting the Civil Service Retirement Act and holding that "*in the absence of compelling language*, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer" (emphasis added)). *See generally* Jaffe 339 (discussing *McAnnulty*).

From this common law tradition emerged a presumption of judicial review that has become a critical element of the modern administrative state. Thus, it is now well settled that there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). By virtue of that presumption, judicial review is available unless there is "'clear and convincing evidence' of a contrary legislative intent." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967) (quoting *Rusk* v. *Cort*, 369 U.S. 367, 379-380 (1962)); *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) ("[W]e have stated time and again that judicial review of executive action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." (internal quotation marks omitted)).[3]

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[3] *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (petitioners were entitled to judicial review where "there [was] no indication that Congress sought to prohibit judicial review and there [was] most certainly no 'showing of "clear and convincing evidence" of a ... legislative intent' to restrict access to judicial review" (citations omitted)). Consistent with the presumption, the Court has interpreted the Administrative Procedure Act's exception to reviewability for agency action

This tradition of judicial review is reflected in the constitutional structure, as well. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-180 (1803). While the presumption of reviewability is often invoked to avoid due process or other concerns that might arise if individual litigants were denied any judicial review of constitutional claims, courts' reluctance to find that Congress has eliminated or restricted judicial review absent a clear indication of intent also stems from and reinforces the constitutional separation of powers.[4] The Constitution's text reflects the separation of powers concerns that inhere in questions concerning the availability of judicial review in the federal courts. The Constitution preserves judicial independence by placing the original jurisdiction of the Supreme Court outside of Congress's control, U.S. Const. art. III, § 2, cl. 2, by providing federal judges with life tenure and protection against salary diminution, *id.* § 1, and by limiting Congress's power to suspend the writ of habeas corpus, *id.* art. I, § 9, cl. 2, while simultaneously giving power otherwise to shape courts' jurisdiction to the most politically accountable branch, *see id.* art. I, § 8, cl. 9; *id.* art. III, §§ 1, 2.

Thus, in the face of the developing administrative state, the presumption played an important role in preserving the institutional prerogatives of the courts and

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"committed to agency discretion" to be a "very narrow exception." *Id.* (discussing 5 U.S.C. § 701) (internal quotation marks omitted).

[4] The presumption of reviewability thus evolved without discussion of constitutional avoidance concepts and, indeed, long predated Justice Brandeis's classic statement of that canon in *Ashwander* v. *TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring); *see also infra* p. 22.

maintaining agencies' legitimacy. *See Stark* v. *Wickard*, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority ... is a judicial function[.]"); *see also Nixon* v. *Fitzgerald*, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring) ("Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances."); Stephen I. Vladeck, Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 Notre Dame L. Rev. 2107, 2128 (forthcoming 2009) (courts' concern in developing the presumption of reviewability "was *not* motivated by a perceived need to protect an individual litigant's right to have an Article III court provide a definitive answer to a question ... but by the possibility that the burgeoning administrative state would frustrate the courts' power to have the *final* say").[5]

The presumption of reviewability has become so ingrained in our governmental system that Congress is assumed to account for it in legislating. *See McNary* v. *Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our ... well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action[.]"); Daniel J. Meltzer, *Congress, Courts,*

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[5] *See also* Sunstein 143 ("This basic principle [of judicial review] assumes special importance in light of the awkward constitutional position of the administrative agency. Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.").

*and Constitutional Remedies*, 86 Geo. L.J. 2537, 2586 (1998) ("[I]f the legislature has been told that judicial review will not be precluded absent the clearest statement, the absence of that clear statement is inextricably part of 'conventional' statutory meaning."). Thus, when a statute is "reasonably susceptible to divergent interpretation, [courts] adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Gutierrez de Martinez*, 515 U.S. at 434.

Accordingly, even assuming that Congress may constitutionally foreclose judicial review of agency action in certain circumstances, to maintain the separation of powers, courts should not construe statutes to have that effect unless it is clear that Congress has addressed the issue in an open and deliberate way. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1611 (2000) ("Requiring a clear statement of Congress's intent to restrict federal jurisdiction effectively flags those provisions of a legislative proposal that implicate Article III values, thereby increasing the likelihood that the political process will actually focus on the structural principles at stake."); *see also id.* at 1605-1613; Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. Mem. L. Rev. 295, 316 (1999) ("The ability of Congress to restrict federal court jurisdiction raises basic constitutional issues in terms of separation of powers[.]"); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 939 (1988) (describing separation of powers interests served by ensuring appellate review

by an Article III court of decisions of non-Article III tribunals). Applying that rule here, the Court should not interpret the Immigration and Nationality Act (INA) to foreclose judicial review of BIA decisions unless the statute reflects Congress's clear intent to so provide.[6]

## II. The Seventh Circuit's Decision Contravened These Clear Statement Requirements And Undermined The Institutional Values Those Requirements Are Intended To Preserve

### A. There Is No Clear Statement In The Statute That Congress Intended To Preclude Judicial Review Of Decisions Denying Reopening

By interpreting the INA to preclude judicial review of BIA denials of motions to reopen, the Seventh Circuit abrogated judicial review where there was no clear statement that Congress meant to bring about that result. The text and legislative history of 8 U.S.C. § 1252(a)(2)(B)(ii) demonstrate that Congress intended "[d]enials of discretionary relief" by the Attorney General or the Secretary of Homeland Security to be insulated from judicial review only where Congress itself has conferred discretion in the statute. The statute thus provides no clear statement of intent to bar judicial review in cases where, as here, the BIA's action is taken pursuant to discretion conferred only by the agency's own regulations. By holding that the statute nonetheless precluded judicial review, the decision below failed to give effect to the institutional values that

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[6] *See* Pet. App. 15a (Ripple, J., concurring *dubitante*) ("[H]ad Congress intended to deprive [the] court of jurisdiction of specific substantive decisions, it would have done so explicitly.").

underlie the clear statement requirement and instead opened the door to the restriction or elimination of judicial review where Congress has not squarely faced the issue. *Cf. Gregory*, 501 U.S. at 461.

"[T]he starting point" in interpreting § 1252(a)(2)(B)(ii) is its text: where "the words of the statute are unambiguous, the judicial inquiry is complete." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98 (2003) (internal quotation marks omitted); *see also Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Here, the plain language of the statute indicates that Congress intended to foreclose judicial review over discretionary determinations only when the Board's discretion is "specified" in the statute. 8 U.S.C. § 1252(a)(2)(B)(ii).[7] To "[s]pecify" means "[t]o mention specifically; to state in full and explicit terms; ... to tell

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[7] The provision states:

> (B) Denials of discretionary relief
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> Notwithstanding any other provision of law (statutory or nonstatutory), ... and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2).

or state precisely." *Black's Law Dictionary* 1399 (6th ed. 1990). Congress did not address BIA discretion over motions to reopen at all, much less "specif[y]" it in the statute. Rather, the BIA's discretion with respect to motions to reopen is established only in its implementing regulations. *See* 8 C.F.R. § 1003.2(a) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board[.]"). The statutory provision concerning the Board's authority to reopen proceedings, 8 U.S.C. § 1229a(c)(7), does not refer to or confer discretion on the Attorney General in connection with motions to reopen, nor does the statute discuss the agency's role in any way. It merely imposes certain procedural limitations on an immigrant's ability to seek reopening. *See id.* (discussing timing and content requirements for motions to reopen).[8] If such broad lan-

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[8] The provision states:

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

guage were sufficient to "specif[y]" the Board's discretion and thus bar judicial review, then "the effects of that jurisdictional bar would be sweeping indeed." *Soltane* v. *DOJ*, 381 F.3d 143, 147-148 (3d Cir. 2004) (Alito, J.) (construing 8 U.S.C. § 1153(b)(4)). That result would thus render the phrase "specified in this subchapter" superfluous and would be fundamentally inconsistent with the separation of powers principles underlying the clear statement requirement. *See, e.g.*, *Zhao* v. *Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005).

The legislative history of § 1252(a)(2)(B)(ii) also fails to supply the requisite clear indication of congressional intent that is missing in the statutory text. The

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(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—[under specified conditions].

8 U.S.C. § 1229a(c) (footnote omitted).

legislative history provides no indication that Congress intended to foreclose judicial review when agency discretion is conferred only by regulation. The conference report accompanying the bill that was ultimately enacted as § 1252(a)(2)(B) contains no explanatory remarks about its meaning; it merely restates the statutory text. H.R. Conf. Rep. No. 104-863, at 621-622 (1996).[9]

Nor does the provision of jurisdiction in § 1252(a)(2)(D) supply the necessary clear statement or cure the problems created by the Seventh Circuit's approach.[10] That section does not govern the scope of § 1252(a)(2)(B)(ii). And while that provision arguably lessens any concern that the jurisdiction-stripping statute is unconstitutional (by allowing judicial review of constitutional claims and questions of law that arise

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[9] The enacted bill incorporated language from another bill, H.R. 2202, which was accompanied by its own separate conference report. H.R. Conf. Rep. No. 104-828 (1996). That report similarly offers no indication that Congress intended to permit the BIA to enact regulations shielding its decisions from judicial review. That report also merely parroted the bill's text. *See id.* at 219 (explaining that § 1252(a)(2)(B)(ii) "bars judicial review ... of any decision or action by the Attorney General which is specified to be in the discretion of the Attorney General").

[10] The provision states:

> (D) Judicial review of certain legal claims
>
> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2).

in the context of discretionary agency actions), it does not remove the need for a clear statement of what agency actions Congress intended to cover within the scope of § 1252(a)(2)(B)(ii). The clear statement requirement operates to preserve the separation of powers, the traditional roles of the branches of government, and the institutional values of accountability and deliberation. Even if Congress is not pushing the bounds of its constitutional authority by limiting courts' jurisdiction to review BIA decisions, separation of powers principles still call for a clear statement that Congress meant to exercise its authority to cut off judicial review. *See, e.g., Gutierrez de Martinez*, 515 U.S. at 434; *Atascadero State Hosp.*, 473 U.S. at 242-243.

Thus, there is no clear indication that Congress intended to foreclose judicial review where the agency's discretion is "specified" only in the agency's regulations. Adhering closely to the statutory requirement that agency discretion must be "specified in the subchapter" to preclude judicial review is not only faithful to the statute's plain language, but also reinforces the institutional values underlying the clear statement requirement by ensuring that Congress itself has clearly intended to confer unreviewable discretion and has done so in a deliberate and politically accountable fashion. In holding that the jurisdiction-stripping provision applies even where Congress has not "specified" its intent in the statute, the Seventh Circuit violated the clear statement requirement and its animating principles.

### B. The Seventh Circuit's Decision Further Undermined The Separation Of Powers By Looking To The Executive Agency To Provide The Necessary Clear Statement

As demonstrated, the court of appeals' decision to apply the jurisdiction-stripping provision in circumstances where Congress did not clearly intend it to apply was fundamentally inconsistent with important separation of powers principles. Yet the Seventh Circuit did further violence to those principles by looking instead to an administrative agency to supply the requisite clear statement—even where the agency itself did not purport to address the availability of judicial review in an open and deliberate fashion. *See* Pet. App. 4a. In doing so, the court effectively reallocated to the Executive an authority that the Constitution confers only on Congress.

The Constitution vests in Congress, not the Executive, the power to establish and define the jurisdiction of the lower courts. U.S. Const. art III, § 1; *see also id.* art. I, § 8 (giving Congress authority "[t]o constitute tribunals inferior to the Supreme Court," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). It is unclear whether the Constitution would permit Congress to delegate to the Executive its authority to make rules defining the lower courts' jurisdiction. Even assuming Congress could do so, however, there is no indication here that Congress intended to take such action or provided any principle to guide the agency's exercise of that authority. "[W]hen Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman* v. *American Trucking Ass'ns*, 531

U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving* v. *United States*, 517 U.S. 748, 771 (1996).

Just as there are outer limits on Congress's authority to delegate its lawmaking power, so there are limits on its authority to delegate its power to define courts' jurisdiction. If that authority can properly be delegated to an agency, such a delegation must at least be made by Congress itself and must be appropriately limited. Courts are thus reluctant to find such a delegation or to sanction attempts by agencies to arrogate to themselves the authority to determine courts' jurisdiction—a reluctance that stems from the same institutional and separation of powers values that underlie the use of clear statement requirements. *See, e.g.*, *Nehmer* v. *Department of Veterans Affairs*, 494 F.3d 846, 860-861 (9th Cir. 2007) (agency cannot "remove itself from [a] court's authority and ignore its orders simply by enshrining its interpretation of a consent decree in a regulation"; allowing agency to do so "would raise a most troubling question of separation of powers"); *Carlyle Towers Condo. Ass'n* v. *FDIC*, 170 F.3d 301, 310 (2d Cir. 1999) ("[I]t is 'axiomatic' that agencies can neither grant nor curtail federal court jurisdiction." (quoting *Miller* v. *FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995))); *United States* v. *Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) (noting that Congress's power to define federal courts jurisdiction is "sensitive and central to our Anglo-American legal tradition" and questioning whether Congress may "delegate such a core legislative

function as its control over federal court jurisdiction to any agency or commission").

Where such a delegation is made, it must at a minimum be carefully circumscribed to ensure that the ultimate jurisdictional scheme is determined by Congress, not the agency or official exercising that delegated authority. *See, e.g.*, *Jones* v. *United States*, 137 U.S. 202 (1890) (federal jurisdiction extended to guano island upon Secretary of State's designation of such island as "appertaining to the United States," but only under specified statutory conditions); *United States* v. *Dryden*, 563 F.3d 1168, 1171 (10th Cir. 2009) (holding there was no unconstitutional delegation to agency of Congress's power to define lower courts' jurisdiction when district court relied on Sentencing Commission policy statement regarding jurisdiction because statement was "merely a paraphrase of Congress's own language," not the agency's opinion); *Owens* v. *Republic of Sudan*, 531 F.3d 884, 888-893 (D.C. Cir. 2008) (rejecting non-delegation challenge to statute predicating federal court jurisdiction on Executive Branch factfinding).[11]

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[11] *Cf. Morrison* v. *Olson*, 487 U.S. 654, 693-696 (1988) (delegation to judicial branch of authority to appoint Independent Counsel did not violate separation of powers in part because the judiciary's appointment power was limited to requests from the Attorney General, and although judicial branch defined scope of Independent Counsel's jurisdiction, jurisdiction was limited to factual circumstances of Attorney General's request); *United States* v. *Nixon*, 418 U.S. 683, 704 (1974) ("[T]he 'judicial Power of the United States' vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the

Here, there is no indication that Congress meant to delegate to the BIA its authority to decide when BIA decisions would be immune from judicial review. Yet by looking to the Board's regulations to determine whether the jurisdiction-stripping provision should apply, the Seventh Circuit's decision effectively delegated Congress's authority to the agency. In doing so, the Seventh Circuit not only ignored the institutional values that require Congress to speak clearly when it intends to eliminate or restrict judicial review, but also effectively reallocated Congress's control over the lower courts' jurisdiction to the agency. Even where Congress clearly manifests a deliberate intent to vest the constitutional authority of one branch in another, such a reallocation may offend the separation of powers. *Cf. Bowsher* v. *Synar*, 478 U.S. 714, 726-727, 733-734 (1986) (unconstitutional for Congress to reserve sole power to remove Comptroller General because it gave Congress control over execution of laws); *INS* v. *Chadha*, 462 U.S. 919, 956-959 (1983) (unconstitutional for Congress to circumvent bicameralism and presentment requirement and presidential veto power through statute permitting one-house congressional veto of executive action); *Buckley* v. *Valeo*, 424 U.S. 1, 121-124, 129 (1976) (unconstitutional for Congress to vest in itself the power to appoint officers of the United States). The decision below yields an even greater injury to separation of powers concerns because it allows a self-interested agency to increase its own power at the expense of and with no overt sanction by Congress.

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checks and balances that flow from the scheme of a tripartite government." (citing *The Federalist* No. 47, at 313 (James Madison) (S. Mittell ed., 1938))).

Permitting the BIA by regulation to trigger the application of the jurisdiction-stripping provision is particularly problematic because a central purpose of the longstanding presumption of judicial reviewability is precisely to ensure that the Executive does not act with unchecked discretion. Thus, as long ago as *Rooke's Case*, the court held that a property owner could bring a replevin action against the commission of sewers to recover property taken in satisfaction of an assessment for drainage repairs, notwithstanding the commission's power under its royal charter to act according "to their discretions." 77 Eng. Rep. 209, 210 (C.P. 1597) (Coke, J.). As Sir Edward Coke famously noted, the commission's "proceedings ought to be limited and bound with the rule of reason and law ... and not ... according to their wills and private affections." *Id.*; *see also FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1830 (2009) (Breyer, J., dissenting) ("American courts have followed a venerable legal tradition, stretching back at least to the days of Sir Edward Coke and the draining of the English fens."). In more recent times, this Court likewise has consistently invoked the presumption to favor judicial review of executive agency actions. *E.g.*, *Gutierrez de Martinez*, 515 U.S. at 424; *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988); *Bowen*, 476 U.S. at 670; *Abbott Labs.*, 387 U.S. at 140-141.

Moreover, the presumption of review over agency decisions is also intended in part to encourage sound administrative decision-making and to promote agency legitimacy. *See* Jaffe 323 ("From the point of view of an agency, the question of the legitimacy of its action is so secondary to that of the positive solution of a problem. It is for this reason that we, in common with nearly all of the Western countries, have concluded that the

maintenance of legitimacy requires a judicial body independent of the active administration."); Fallon, 101 Harv. L. Rev. at 942 ("Because of agencies' hybrid and problematic status in our constitutional system, Congress frequently provides for judicial review in part to secure an imprimatur of legitimacy for administrative action."); *see also* Sunstein 154. Requiring a clear statement of congressional intent before interpreting a statute to foreclose judicial review of agency action thus not only ensures that difficult decisions are made by politically accountable bodies, but also preserves the agency's status as a constitutionally legitimate actor.

These salutary effects of judicial review of encouraging sound decision-making and promoting agency legitimacy are of particular importance in the context in which this case arose. The BIA's internal deliberative process has been widely criticized as failing to promote the institutional values of accountability, deliberation, and agency legitimacy that the clear statement requirement and presumption of reviewability are intended to serve. *See, e.g.*, *Kadia* v. *Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) ("Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload[.]"); *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (collecting statements of "severe" judicial criticism of the BIA; "adjudication of these cases ... has fallen below the minimum standards of legal justice").[12] Looking to the agency for a

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[12] *See also Wang* v. *Attorney General*, 423 F.3d 260, 267-268 (3d Cir. 2005); *Recinos de Leon* v. *Gonzales*, 400 F.3d 1185, 1193 (9th Cir. 2005). Indeed, some immigration judges have acknowledged that since regulatory changes in 2002 increased the BIA's

statement of intent to preclude judicial review where Congress has supplied none thus violates precisely the separation of powers principles that warrant application of a clear statement requirement in the first place.

The Seventh Circuit's decision is even more problematic from this separation of powers perspective because even if the agency had been delegated authority to restrict judicial review, there is in fact no indication that it meant to exercise such authority here. The BIA's regulation says only that the decision to reopen is within the Board's discretion. 8 C.F.R. § 1003.2(a). It does not address judicial review and thus provides neither notice that judicial review will be affected nor any avenue for political accountability. Indeed, nothing in the rulemaking process indicates that the BIA intended to alter the traditional balance of power between the branches of government by depriving the federal courts of jurisdiction. *See, e.g.*, 61 Fed. Reg. 32,924, 32,924 (June 26, 1996) (describing the purpose of the regulation as centralizing the appeals and motions procedures and establishing time and number limitations on motions, but omitting any mention of judicial review).[13] The Seventh Circuit's decision below thus presents a problem of double inadvertence by finding judicial review to be precluded in the absence not only

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reliance on affirmances without opinion, immigration judges have not had the resources or training needed to fulfill their new responsibility to provide thorough and fully reasoned written opinions. Michele Benedetto, *Crisis on the Immigration Bench*, 73 Brook. L. Rev. 467, 479-480 (2008).

[13] *See also* 67 Fed. Reg. 54,878, 54,904 (Aug. 26, 2002); 64 Fed. Reg. 56,135, 56,142 (Oct. 18, 1999); 62 Fed. Reg. 10,312, 10,330-10,331 (Mar. 6, 1997); 61 Fed. Reg. 18,900, 18,904-18,905 (Apr. 29, 1996).

of a clear statement from Congress, but even from the agency itself.

Nor are the harmful effects of the decision below limited to BIA decisions on motions to reopen. The BIA frequently acts pursuant to discretion that is conferred by its own regulations, not by statute. *See, e.g.*, 8 C.F.R. § 1003.2(a) (conferring discretion in deciding motions to reconsider); Pet. App. 14a (Ripple, J., concurring *dubitante*) (discussing the extension of the Seventh Circuit's holding to motions to reconsider); *see also* Pet. Br. 38-39 (discussing other examples). The Seventh Circuit's analysis would treat these regulations as jurisdiction-stripping actions, again without any evidence of intent to exercise such authority by the agency in question.

The institutional values underlying the clear statement rule are thus directly and repeatedly implicated by the Seventh Circuit's decision in this case. That decision should be reversed to avoid a result that disturbs the traditional roles of the separate branches of government without any clear statement that Congress intended such a result. In the absence of evidence of clear intent by Congress to preclude judicial review, it further violates separation of powers principles to look instead to an administrative agency to supply the requisite clear statement. And the agency in any event did not do so in this case, where it never squarely faced the question of judicial review in crafting the regulation on which the Seventh Circuit's analysis hinges. It is thus particularly important to reinforce the institutional values of deliberation and accountability that the clear statement requirement is meant to promote where neither Congress nor the agency in question has evidenced clear intent to pre-

clude judicial review of BIA denials of motions to reopen.

## CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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# AMICUS CURIAE BRIEF

135

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IN THE

# Supreme Court of the United States

AGRON KUCANA,

*Petitioner,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF NATIONAL IMMIGRANT JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICAN JUSTICE CENTER, FLORIDA IMMIGRANT ADVOCACY CENTER, HEBREW IMMIGRANT AID SOCIETY, IMMIGRANT LAW CENTER OF MINNESOTA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL IMMIGRATION LAW CENTER, AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amicus* Heartland Alliance's National Immigrant Justice Center ("NIJC") is a non-profit organization accredited by the Board of Immigration Appeals ("BIA") to provide immigration assistance since 1980. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. NIJC provides legal education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence and victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In fiscal year 2008, NIJC provided legal services to more than 8,000 non-citizens.

*Amicus* American Immigration Lawyers Association ("AILA") is a national association with over 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the U.S. District Courts, the U.S. Courts of Appeals, and the Supreme Court of the United States.

*Amicus* Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community organization. A nationally recognized voice on immigration and immigrant rights on behalf of Asian Americans, AAJC has long spearheaded advocacy and education in the community on matters affecting families and individuals in immigration proceedings.

*Amicus* Florida Immigrant Advocacy Center ("FIAC"), a not-for-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC's mission is to protect and promote the basic human rights of immigrants of all nationalities. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy, and education. For more than twelve years, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the

Board of Immigration Appeals ("BIA"), and the U.S. Courts of Appeals.

Since its founding in 1881, the central mission of *Amicus* Hebrew Immigrant Aid Society ("HIAS") has been to rescue Jews and others fleeing persecution and to assist them to start their lives anew in peace and security in the United States and elsewhere. In fulfillment of this mission, HIAS maintained staff at Ellis Island to assist individuals through the immigration process, including representation in exclusion proceedings. More recently, HIAS attorneys and accredited representatives have provided legal representation to asylum seekers in immigration courts in the New York area, including at immigration detention facilities. HIAS has successfully represented numerous asylum seekers throughout the appellate process, up to and including the U.S. Courts of Appeals. Through this experience we have learned how difficult it can be for asylum seekers to present sufficient evidence for their claims to be adjudicated, and how often it is necessary to go through several levels of review before all evidence is presented and considered and a just decision is reached. Therefore, HIAS believes it is crucial that individuals fleeing persecution have the opportunity for full judicial review of their cases, including when necessary the ability to move for their cases to be reopened for further review when the evidence and circumstances warrant.

*Amicus* Immigrant Law Center of Minnesota is a Minnesota-based organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants.

*Amicus* Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil

rights organization established in 1968. Its principal objective is to promote the civil rights and equality of treatment of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF therefore has an interest in the fair, predictable, and even-handed interpretation and enforcement of the nation's immigration laws.

*Amicus* National Immigration Law Center ("NILC") is a nonprofit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure that the government treats immigrants with fairness and due process. NILC has a direct interest in the issues in this case.

*Amicus* Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are applying for immigration and naturalization benefits and to persons who are placed in removal proceedings. NWIRP works both by providing direct representation to indigent persons in removal proceedings and by participating in legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation.

## SUMMARY OF THE ARGUMENT

Section 1252(a)(2)(B)(ii) of Title 8 of the United States Code limits federal court jurisdiction to review certain discretionary decisions made by the immigration courts. Contrary to the Seventh Circuit's holding below, however, the proper legal construction of this provision does not implicate judicial review of motions to reopen immigration proceedings. Rather, the statutory language confirms that Congress intended the courts of appeals to retain oversight of these important rulings.

This brief underscores the baneful consequences of adopting the Seventh Circuit's jurisdictional view of § 1252(a)(2)(B)(ii) in the reopening context. There is a critical need for judicial review of the BIA's denials of motions to reopen, particularly in light of the recognized failures of the immigration courts in recent years. See *infra* at 8-9.

This Court has recognized that a motion to reopen is an important safeguard of immigrant rights. *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008). As the case studies presented below demonstrate, judicial review of agency decisions is essential to ensure the proper resolution of individual cases and to protect immigrants from the severe consequences of an erroneous agency ruling. There is a substantial national interest in avoiding errors in asylum and other immigration cases; to this point, the government itself agrees that Congress did not intend to foreclose judicial review of motions to reopen. See Gov't Br. at 13. Thus, this Court should be hesitant to presume, as the Seventh Circuit did in the decision below, that Congress intended to dispense with this important check on agency decision-making where it has not clearly stated a desire to do so.

## ARGUMENT

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-546 to -724, stripped the federal courts of jurisdiction to review BIA decisions where the agency's authority is "specified" under the relevant statutory subchapter to be within the Attorney General's discretion. 8 U.S.C. § 1252(a)(2)(B)(ii). Motions to reopen do not fall within this limited category. IIRIRA codified the right to file a motion to reopen and set forth certain procedural guidelines for filing such motions at 8 U.S.C. § 1229a(c)(7). The authority of the Attorney General to grant or deny motions to reopen is notably absent from this statutory provision. Rather, the Attorney General's discretion over these motions is imparted exclusively by regulation. 8 C.F.R. § 1003.2(a). Because nothing in the relevant statutory subchapter, 8 U.S.C. §§ 1151-1381, specifies that motions to reopen are within the Attorney General's discretion, by its own terms, § 1252(a)(2)(B)(ii) does not apply.

*Amici* concur with petitioner's legal argument, that the Seventh Circuit erred in holding that § 1252(a)(2)(B)(ii) applies to the BIA's denial of a motion to reopen. This brief is intended to illustrate the effects that would follow from the Court's adoption of the Seventh Circuit's interpretation of § 1252(a)(2)(B). Looking at a broad range of immigration rulings across the federal circuits, it catalogues the many instances in which judicial review was necessary to the correct disposition of the case.

As a practical matter, an adverse ruling by an immigration judge ("IJ") or the BIA can result in severe consequences to the individual immigrant or

asylum-seeker, "in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (Brandeis, J.); see also *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945). Judges, legal scholars, and practitioners agree that widespread problems have at times plagued the immigration system, calling into doubt the accuracy of administrative rulings in particular cases. See Michele Benedetto, *Crisis on the Immigration Bench*, 73 Brook. L. Rev. 467, 469 (2008).

None of these erroneous rulings would be subject to judicial review under the construction of § 1252(a)(2)(B)(ii) adopted by the Seventh Circuit, which would preclude review of *all* claims underlying motions to reopen (subject to the limited exception in subparagraph (D) for "questions of law").[2] Indeed, many prior decisions of the Seventh Circuit—including those in which the court concluded that the "record d[id] not come close to supporting [the BIA's] finding," *Gaberov* v. *Mukasey*, 516 F.3d 590, 596 (7th Cir. 2008)—would be outside the court's jurisdiction under its current reading of § 1252(a)(2)(B)(ii). To provide immigrants with a full and fair opportunity to present their claims, this Court should hold, in accordance with the plain language of § 1252(a)(2)(B)(ii), that the courts of appeals retain

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[2] The Seventh Circuit interprets § 1252(a)(2)(B) as applying not only to discretionary decisions, but to anything related to discretionary applications. Pet. App. 8a-9a. The Seventh Circuit's view is erroneous and conflicts with the majority of the circuits. *See generally* Br. *Amicus Curiae* of ACLU 12-18; *cf.*, *e.g.*, *Sepulveda* v. *Gonzales*, 407 F.3d 59, 62 (2d Cir. 2005). This brief illustrates the effects that would follow from adoption of the Seventh Circuit's interpretation of § 1252(a)(2)(B), of which only one aspect (*i.e.*, whether § 1252(a)(2)(B)(ii) applies to motions to reopen) is included within the question presented and has been briefed by the parties.

jurisdiction to review and correct errors by the BIA in addressing motions to reopen.

## I. FLAWS IN THE AGENCY'S ADJUDICATIVE PROCESS STRONGLY SUGGEST THE NEED FOR JUDICIAL REVIEW.

It seems beyond cavil that the immigration system has, on occasion, issued final administrative decisions that are biased, unreasoned, plainly erroneous, and that "fall[] below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005). Without wishing to generalize, the existence of such decisions suggests the utility of continued federal court review over immigration decisions.

For instance, in *Wang* v. *Att'y Gen.*, 423 F.3d 260 (3d Cir. 2005), the Third Circuit noted "a disturbing pattern of IJ misconduct" and reprimanded the IJ for failing to function as a neutral and impartial arbiter. *Id.* at 268. In *Galina* v. *INS*, 213 F.3d 955 (7th Cir. 2000), the Seventh Circuit found the BIA's analysis "woefully inadequate" and the result of "a rather astounding lapse of logic." *Id.* at 958-59. In *Fiadjoe* v. *Att'y Gen.*, 411 F.3d 135 (3d Cir. 2005), the Third Circuit granted a Ghanaian woman's petition and remanded the case for rehearing before a different IJ because of the "hostile" and "extraordinarily abusive" nature of the initial hearing. *Id.* at 154, 163. The court also found that the IJ mischaracterized petitioner's testimony and based his decision on factual conclusions that were "totally wrong." *Id.* at 155-57; see also *Shah* v. *Att'y Gen.*, 446 F.3d 429, 436, 436-37 (3d Cir. 2006) (the IJ's factual conclusions, which the BIA summarily affirmed, were "entirely unsupportable" and "disturbing," and based on an "apparent zeal to deny relief to petitioner"); *Niam* v. *Ashcroft*, 354 F.3d 652, 654-55 (7th Cir. 2004)

(criticizing IJ analysis which flatly failed to engage with the evidence presented to him).

The BIA has proven to be an unreliable check on such agency errors. Beginning in 2002, the BIA implemented streamlined review procedures that often resulted in only a cursory review of IJ decisions by the BIA. See, *e.g.*, *Berishaj* v. *Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004); *Niam*, 354 F.3d at 656; Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 Stan. L. & Pol'y Rev. 481, 505-08 (2005); Lindsey R. Vaala, *Bias on the Bench*, 49 Wm. & Mary L. Rev. 1011, 1021 (2007). Aimed at reducing the large backlog of BIA cases, the 2002 procedural changes made single-member review of IJ decisions the default, permitted summary affirmance without opinion in most cases, and reduced the BIA's scope of review to reach fewer claims for relief. Vaala, *supra*, at 1018-20.

These changes had a measurable and negative impact on administrative appeals. They led to a vast increase in the number of summary affirmances, see Benedetto, *supra*, at 478 (noting a 57 percent increase in summary affirmances in a seven-month period in 2002), and a sharp decrease in BIA decisions granting relief to immigrants, see *id.* at 479 (finding BIA decisions grating relief to immigrants fell from 25 percent to 10 percent). In the absence of meaningful administrative review of immigration rulings, agency errors have come directly to the federal courts. See *id.*

## II. THE AGENCY'S HISTORY OF EGREGIOUS ERRORS IN ADDRESSING MOTIONS TO REOPEN CONFIRMS THE NEED FOR JUDICIAL REVIEW.

The cases highlighted below show that the agency frequently denies motions to reopen based on erroneous factual findings and flawed reasoning. In such cases, the courts of appeals provide the only opportunity to obtain a proper and lawful disposition of an immigrant's claim for relief. The practical consequences of barring judicial review of these decisions would be severe.

### A. Adoption Of The Seventh Circuit's Rule Would Effectively Eliminate Review Over *In Absentia* Removal Orders.

An order of removal issued *in absentia* may not be administratively appealed, see *Gonzalez-Lopez*, 20 I. & N. Dec. 644, 646 (BIA 1993), but may be rescinded upon a motion to reopen showing that notice was improper or ineffective, or that "exceptional circumstances" excused the failure to appear. 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). The BIA has nevertheless denied motions to reopen *in absentia* orders in cases in which this standard was plainly satisfied, including when the individual missed the hearing because he was refused entrance to the courthouse, see *Twum* v. *INS*, 411 F.3d 54, 57 (2d Cir. 2005), or because immigration officials sent notice of the hearing to the wrong address. See *Qumsieh* v. *Ashcroft*, 134 F. App'x 48, 48 (6th Cir. 2005). In such cases, the BIA wrongly deprived the immigrant of the opportunity to present his claims,

and appellate review was necessary to correct the injustice.[3]

One such case is *Ba* v. *Holder*, 561 F.3d 604 (6th Cir. 2009), where the BIA denied a motion to reopen filed by a citizen of Mauritania, who was ordered removed *in absentia* after she failed to appear for a hearing on her claims for asylum, despite compelling evidence that she never received notice of the hearing. *Id.* at 605-06. Reversing the BIA's order, the Sixth Circuit reasoned that the petitioner's act of notifying immigration officials of her change of address subsequent to the missed hearing date (but prior to learning she had been ordered removed *in absentia*) dispelled any notion that she willfully failed to appear. *Id.* at 607-08.

Similarly, in *Qumsieh*, a Jordan immigrant was ordered removed *in absentia* notwithstanding a factual record that clearly demonstrated that the petitioner did not receive notice of the hearing. 134 F. App'x at 51-52. The immigration court sent the notice to appear to the wrong address, even though the petitioner's attorney timely advised immigration officials of his client's new address, and then failed to correct its mistake when the notice was returned as undeliverable prior to the hearing date. *Id.* at 49. The court of appeals held that the motion to reopen should have been granted because the petitioner did not receive the requisite notice. *Id.* at 52.

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[3] Motions to reopen seeking recession of removal orders entered *in absentia* are subject to different procedural requirements than other motions to reopen. *Armendarez-Mendez*, 24 I. & N. Dec. 646, 654 n.6 (BIA 2008). However, the text of the statute regarding recession and reopening is similar, and the Seventh Circuit has held that, under *Kucana*'s authority, judicial review is prohibited over both. *Adebowale* v. *Mukasey*, 546 F.3d 893, 896 (7th Cir. 2008).

In *Mecaj* v. *Mukasey*, 263 F. App'x 449 (6th Cir. 2008), the BIA was reversed for failing to credit evidence that the petitioner lacked notice of his removal hearing. The Sixth Circuit held that the IJ "ignored" strong circumstantial evidence that the petitioner had not actually received notice that his hearing had been rescheduled (for a second time) to an earlier date, including that he attended the initial hearing and arrived in court on the date of the first rescheduled hearing, only to learn he had been ordered removed *in absentia*. *Id.* at 451.

In *Lopes* v. *Gonzales*, 468 F.3d 81 (2d Cir. 2006) (per curiam), the Second Circuit flatly disagreed with the BIA's statement that a Brazilian immigrant offered "no proof" of non-receipt of a hearing notice. *Id.* at 85-86. That court specifically identified three facts that suggested the petitioner would not have ignored a hearing notice, all of which the BIA failed to even consider—(1) he filed an application with immigration officials to obtain a benefit; (2) he promptly notified immigration officials of his change of address; and (3) he disclosed the order of removal on a subsequent application for relief. *Id.* at 86.

In *Galvez-Vergara* v. *Gonzales*, 484 F.3d 798 (5th Cir. 2007), the alien failed to appear through the fault of his attorney, but the BIA ignored its precedential caselaw finding that ineffective assistance of counsel could constitute an extraordinary circumstance. *Id.* at 802-03. The Fifth Circuit found that the agency's failure to analyze or even cite its contrary caselaw was an abuse of discretion and required remand. *Id.*

In perhaps the most obvious example of BIA error, in *Twum*, the court held that the IJ abused her discretion in finding an alien from Ghana could not show "reasonable cause" for his failure to appear at

the hearing, when that failure was attributable solely to the fact that security guards refused to allow him to enter the courthouse because his lawyer, who was already inside the building, had the hearing notice. 411 F.3d at 60-62. The IJ's decision, which mischaracterized the petitioner's claim as one for ineffective assistance of counsel, "made no mention whatsoever of the crucial allegation that the guards would not permit Twum to enter [the courthouse] without his hearing notice despite his urgent protestations that he had a hearing." *Id.* at 59. The Second Circuit held that the IJ's failure to consider this evidence rendered the decision arbitrary, and noted that "[w]hile the Immigration Court can and must expect respondents who are ordered to appear before it to make every responsible effort to comply with the order, it cannot expect the impossible." *Id.* at 61.

In all of these cases, the BIA misread or simply ignored critical evidence that the individual had not received notice of a hearing and, as a result, improperly denied motions to reopen. Under the Seventh Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(B)(ii), however, none of these cases would be reviewable. Pet. App. 3a-12a; see also *Adebowale*, 546 F.3d at 896. The individuals adversely affected by the BIA's mistakes would, through no fault of their own, be denied relief and subject to removal.

### B. Jurisdiction Over Reopening Is Necessary To Effectuate Congressional Intent Preserving Review Over Asylum Claims.

Congress permits aliens to seek reopening of their cases where a material change in conditions in their home country creates a situation where they might reasonably fear returning to that country. See 8

U.S.C. § 1229a(c)(7)(C)(ii). The BIA, however, has erroneously denied motions to reopen based on its refusal to consider, among other things, a State Department report documenting a "sharply deteriorating human rights situation" for Jewish individuals in Iran, see *Norani* v. *Gonzales*, 451 F.3d 292, 294 (2d Cir. 2006) (per curiam), news articles reporting the deaths of twenty-two Ethiopians for protesting government-sponsored election fraud, see *Kebe* v. *Gonzales*, 473 F.3d 855, 856 (7th Cir. 2007), and evidence of a new military conflict between Lebanon and Israel presented by a Lebanese petitioner who had previously been detained and tortured by Hizballah for being an Israeli collaborator. See *Habchy* v. *Filip*, 552 F.3d 911, 913-15 (8th Cir. 2009). None of these decisions—all of which were reversed by the courts of appeals as clearly in error—would be reviewable under the Seventh Circuit's rule.

In *Norani*, a married couple of Iranian nationality filed a motion to reopen based on changed circumstances in Iran, alleging a fear of persecution if removed to Iran based on the husband's Jewish religion and nationality and the couple's interfaith marriage. 451 F.3d at 293. Among other evidence, the petitioners submitted various country reports, all of which post-dated the initial closing of their immigration proceedings, describing "a sharply deteriorating human rights situation, torture in prisons, increasingly virulent and official antisemitism . . . and a prohibition against interfaith marriage." *Id.* at 293-94. In a three-sentence order, the BIA found that the petitioners failed to show this evidence was material and previously unavailable and denied the motion. *Id.* at 294. The Second Circuit termed the decision "conclusory" and "devoid

of reasoning" and noted that it ignored the substantial record evidence of declining country conditions. *Id.* at 294-95.

The Seventh Circuit reversed the BIA for a similar abuse of discretion in *Kebe* (which predates *Kucana*), a case in which an Ethiopian national and member of the Oromo Liberation Front ("OLF") presented material new evidence that the Ethiopian government increased repression of opposition groups, including the OLF, after the 2005 elections—evidence the BIA failed to discuss or analyze in denying the motion. 473 F.3d at 856-57. The court explained, "the absence of any articulated reasons for the BIA's decision constitutes an abuse of discretion and requires a remand." *Id.* at 857.

The BIA likewise erred in denying a motion to reopen based on changed country conditions in Lebanon in *Habchy*. Specifically, the Eighth Circuit found that the BIA erroneously confined its review to one aspect of the petitioner's claim for relief—a fear of persecution based on his Christian religion. 552 F.3d at 913-15. It failed, however, to even consider whether the newly presented evidence, related to the military conflict between Lebanon, Hizballah, and Israel in July and August 2006, supported the petitioner's claimed fear of persecution on the basis of political opinion. *Id.* This evidence was highly relevant to the petitioner's claim given his past affiliation with the Lebanese Forces, a Christian political party that opposes Hizballah and is a perceived supporter of Israel. *Id.*

If the Seventh Circuit's rule were adopted by this Court, individuals such as those described above, erroneously denied an adequate opportunity to present their asylum claims, would have been removed to countries where they fear death or

persecution, without ever having a chance to have the agency's decision reviewed. This is a plainly unreasonable result, and one which Congress did not intend. See, *e.g.*, 8 U.S.C. § 1252(a)(2)(B)(ii) (specifically exempting asylum claims from the jurisdictional bar on review of discretionary decisions).

### C. The Seventh Circuit's Rule Would Preclude Review Over Agency Refusals To Correct Its Errors.

A motion to reopen serves as a means to correct or supplement the factual record with new evidence that substantiates an alien's claims for relief. See, *e.g.*, *Cerna*, 20 I. & N. Dec. 399, 403 (BIA 1991). The merit of appellate review is particularly apparent where the BIA denies a motion to reopen that would clarify material facts, such as medical evidence that the petitioner's wife was forcibly sterilized, see *Chen* v. *U.S. Att'y Gen.*, 262 F. App'x 984, 984-85 (11th Cir. 2008) (per curiam), a subsequent judicial determination that the government's key witness, whose testimony formed the basis of the IJ's adverse credibility ruling, made fraudulent statements about the petitioner, see *Verano-Velasco* v. *U.S. Att'y Gen.*, 456 F.3d 1372, 1376-77 (11th Cir. 2006) (per curiam), and undisputed evidence that the petitioner's marriage to a U.S. citizen qualifies him for adjustment of status. See *Chu Ying Kwao* v. *U.S. Citizenship & Immigration Serv.*, 255 F. App'x 578, 579 (2d Cir. 2007). The Seventh Circuit's rule would bar judicial review of motions to reopen in these circumstances, leaving aliens with no recourse to challenge demonstrably incorrect rulings.

In *Hen Shi Yang* v. *Gonzales*, 187 F. App'x 88 (2d Cir. 2006), the Second Circuit held that the BIA's denial of the motion to reopen could not stand

because "its decision is premised on errors of fact, including a mischaracterization of the IJ's decision." *Id.* at 89. Specifically, the court rejected the BIA's conclusion that the IJ's adverse credibility finding was not based entirely on inconsistencies between the petitioner's testimony and a State Department report because the only alleged testimonial inconsistency—whether the petitioner was home when government officials came to take his wife for one of her IUD insertions—was not supported by the record. *Id.* at 90.

In another example of BIA error, *Chen*, a Chinese national sought to reopen removal proceedings based on new medical evidence that his wife had been forcibly sterilized. 262 F. App'x at 985. The evidence submitted in support of petitioner's asylum claim included an x-ray, an x-ray report, and a separate physician's report confirming the x-ray showed a sterilization. *Id.* After finding the physician's report to be "the key evidence" in the case, the BIA erroneously deemed it "indecisive," stating that the physician's report did not identify the patient by name. *Id.* at 987. Taking its own look at the evidence, the court of appeals found that the patient identification and film numbers on the x-ray and x-ray report matched those on the physician's report. *Id.* It held that "the BIA's factual determination with respect to the physician's report is not supported by the record" and vacated the order "in light of the BIA's clear factual error." *Id.*

Moreover, newly discovered evidence can be used to challenge an adverse credibility finding, which is sometimes the IJ's sole basis for rejecting an immigrant's claims. That is precisely what happened in *Verano-Velasco*, where the IJ denied a Colombian immigrant's claim for asylum based on political

persecution because the IJ believed the father of petitioner's child, a government witness, whose testimony contradicted the petitioner's testimony. 456 F.3d at 1375. The petitioner filed a motion to reopen to submit evidence that, in a later custody proceeding, a family court found the father's claims against the petitioner to be fraudulent. *Id.* at 1376-77. Incredibly, the government argued that the new information was immaterial. *Id.* Reversing the BIA's denial of the motion to reopen, the Eleventh Circuit stated, "[w]e can think of nothing more crucial to an evaluation of the credibility of Verano than a full consideration of the character and credibility of Lopez." *Id.*

Because an alien who has been ordered removed must file a motion to reopen to seek adjustment of status based on new evidence, proper resolution of the motion to reopen is imperative and appellate review is often the deciding factor in assuring a correct disposition of such claims. See, *e.g.*, *Wellington* v. *INS*, 108 F.3d 631, 635 (5th Cir. 1997); see also 8 C.F.R. § 1245.2. In *Chu Ying Kwao*, for example, the Second Circuit vacated a BIA order affirming the IJ's denial of a motion to reopen for adjustment of status because the BIA failed to consider material evidence in the record that demonstrated the bona fides of the petitioner's marriage, including a statement by INS that the petitioner had established prima facie eligibility for adjustment of status. 255 F. App'x at 579.

In all of these circumstances, consideration of evidence overlooked or refused by the BIA was necessary to correct mistaken factual findings and properly adjudicate the claims. Yet, again, adoption of the Seventh Circuit's rule would bar courts of appeals from acting, even where the agency's error is

clear and likely dispositive, without regard to the consequences to the alien or their family. Pet. App. 3a-12a.

### D. The Seventh Circuit's Rule Would Preclude Review Over The Agency's Wrongful Use Of Procedural Bars To Deny Reopening.

In addition to denying motions to reopen on substantive grounds, the immigration courts also have erected procedural barriers to relief. The courts of appeals have found an abuse of discretion where the BIA has discredited equitable factors, including where the petitioners were defrauded by an individual claiming to act on their behalf, see *Rodriguez-Lariz* v. *INS*, 282 F.3d 1218, 1225-26 (9th Cir. 2002), and where the petitioners justifiably relied on immigration officials' faulty advice. See *Gaberov*, 516 F.3d at 592-93, 596-97; *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1193-94 (9th Cir. 2001). None of these errors could be reviewed or corrected under the holding of the judgment below.

In *Rodriguez-Lariz*, for instance, the BIA denied petitioners' motion to reopen, erroneously refusing to permit an equitable waiver because it found that the petitioners should have been able to discover their counsel's fraudulent actions before filing the initial motion. 282 F.3d at 1224. The Court of Appeals rejected this finding, stating the "facts demonstrate that petitioners were taken advantage of by an unscrupulous immigration consultant who persuaded petitioners to pay relatively large sums of money in exchange for faulty and ineffective representation and lied to them about his own defaults." *Id.* at 1225. On this factual record, the court simply disagreed that equitable relief was not warranted, and

concluded that the BIA had abused its discretion. *Id.* at 1225-26.

The courts of appeals also have stepped in to reverse cases in which the immigration courts unreasonably refused to equitably toll the time limit for filing motions to reopen. *Gaberov* is a fitting example. In that case, a Bulgarian immigrant maintained that he did not receive proper notice of the BIA's final decision on his asylum application because the BIA mistakenly mailed its decision in a *different* case to his counsel. 516 F.3d at 592-93. In trying to ascertain the status of his case, the petitioner subsequently relied on several erroneous assurances by immigration officials that the deficient notice his counsel received was not binding. *Id.* It was not until years later, upon receiving a "bag and baggage" letter instructing him to report for deportation, that the petitioner filed a motion to reopen based on the deficient notice. *Id.* at 593. Reversing as an abuse of discretion the BIA's order denying the motion to reopen as untimely, the court categorically rejected the BIA's conclusion that the petitioner's evidence of due diligence was "irrelevant" and held that the circumstances warranted equitable tolling. *Id.* at 596-97.

In *Socop-Gonzalez*, a Guatemalan national relied on incorrect advice from immigration officials that he should withdraw his application for asylum and submit an application for adjustment of status in light of his recent marriage to a U.S. citizen, unaware that following this advice triggered his deportation. 272 F.3d at 1193-94. Reversing and remanding the case, the court held that the BIA should have tolled the limitations period to allow the petitioner to file a motion to reopen to adjust his status. *Id.* at 1194. As the court explained, the facts clearly demonstrated

that the petitioner was "diligently pursuing his rights," and the BIA had abused its discretion in denying the motion. *Id.*

The procedural errors in these cases reflect fundamental misapprehensions of the factual record at issue. They clearly call for appellate review and correction, particularly in light of the potentially devastating consequences of the BIA's errors. The Seventh Circuit would nevertheless preclude judicial review in these and many other decisions, permitting individuals to be removed not only despite, but *because of* the BIA's mistakes. Pet. App. 3a-12a; see also *Johnson* v. *Mukasey*, 546 F.3d 403, 405 (7th Cir. 2008).

* * * *

It is clear from the statutory text of § 1252(a)(2)(B)(ii) that Congress intended to retain judicial review over motions to reopen. See *supra* at 6. And as the appellate caselaw above copiously illustrates, this was a wise choice. Without scrutiny by the federal courts there is a very real risk that immigrants will be denied a fair opportunity to present their meritorious claims for relief. See *supra* at 10-21. Left uncorrected, the BIA errors in these and other cases would undoubtedly have substantial adverse consequences for immigrants—most notably, removal from the United States, permanent separation from family members, and persecution in the country of removal. Judicial review in this context is absolutely necessary to effectuate the just administration of U.S. immigration law and to maintain the integrity of U.S. immigration policy.

## CONCLUSION

For these reasons, and those stated in petitioner's brief, the judgment of the Seventh Circuit should be reversed and this case should be remanded for further proceedings.

Respectfully submitted,

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July 20, 2009

# AMICUS CURIAE BRIEF

142

(11)

No. 08-911

IN THE

# Supreme Court of the United States

AGRON KUCANA,
*Petitioner,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
*Respondent.*

**On Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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## QUESTION PRESENTED

Do the federal courts of appeals have jurisdiction to review a Board of Immigration Appeals decision to deny a second motion to reopen immigration proceedings, filed by an alien subject to a final order of removal, seeking to reapply for asylum or withholding of deportation based on changed circumstances?

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## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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## INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to support the prompt deportation of aliens who enter or remain in the United States in violation of our law, thereby ensuring that those aliens do not take immigration opportunities that might otherwise be extended to others. *See, e.g., Nken v. Holder*, 129 S. Ct. 1749 (2009). WLF has also opposed efforts by federal courts to exercise jurisdiction over immigration matters that are properly the prerogative of the elected branches of government. *See, e.g., Clark v. Martinez,* 543 U.S. 371 (2005); *Demore v. Kim*, 538 U.S. 510 (2003); *INS v. St. Cyr,* 533 U.S. 289 (2001); *Reno v. American-Arab Anti-Discrimination Comm.* ("*AAADC*"), 525 U.S. 471 (1999).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties (as well as counsel appointed by the Court to support the judgment below) have consented to the filing of this brief; letters of consent have been lodged with the clerk.

New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of the significant national security concerns raised by immigration matters, *amici* believe that the courts should abide by Congress's determination that the courts have an extremely limited role to play in overseeing whether final orders of removal should be reopened. Congress has decreed that it is largely up to the political branches of government to decide whether those aliens who are determined (following completion of all judicial review) to be present in this country without authorization should be permitted further opportunities to challenge that determination. *Amici* are concerned that courts are undermining the effectiveness of immigration enforcement efforts when they permit aliens to seek judicial review of denials of motions to reopen, and then routinely block removal while they undertake that review. As evidenced by this case, the ready availability of such delays frequently permits savvy attorneys to postpone indefinitely the deportation of their alien clients. *Amici* do not support removing aliens who qualify for asylum to countries where their lives will be endangered. *Amici* nonetheless believe that there are sufficient checks built into the system that such removals are highly unlikely even if courts abide by Congress's limitations on their jurisdiction.

## STATEMENT OF THE CASE

Petitioner Agron Kucana, a citizen of Albania,

entered the United States in July 1995 on a 90-day non-immigrant business visitor visa. The visa required him to leave by October 11, 1995. Nonetheless, he remains in the U.S. to this day, 14 years after he was required to leave, despite repeated efforts by the federal government to remove him.

In May 1996, Kucana filed with the INS an application for asylum and withholding of removal, alleging that he would be persecuted based on his political opinions if he returned to Albania. The INS charged him with being a removable alien, and his application was referred to an immigration judge (IJ). When he failed to appear for a hearing to determine his eligibility for asylum – a 1997 hearing date he acknowledges being aware of – the IJ ordered his removal *in absentia*.

Kucana did not seek judicial review of that order. Instead, he moved to reopen his removal proceedings, claiming that his failure to appear at the 1997 hearing was excusable. The IJ denied the motion to reopen in February 1998. The IJ found that Kucana had failed to satisfy either of the two statutory criteria for obtaining relief from an *in absentia* removal order: (1) a showing that he did not receive notice of the hearing; or (2) a showing that his failure to appear was due to "exceptional circumstances." 8 U.S.C. § 1252b(c)(3)(B) & (A) (1996). His appeal from that decision was denied by the Board of Immigration Appeals (BIA) in May 2002. He did not seek judicial review of the BIA's decision.

More than four years later, Kucana filed a second

motion to reopen his final order of removal. He argued that social and political changes in Albania since his case was last heard strengthened his asylum claim and thereby warranted reopening removal proceedings. The IJ denied the motion in July 2006, and Kucana appealed to the BIA.

The BIA's December 2006 ruling rejected Kucana's claims. Pet. App. 22a-26a. The BIA initially ruled that the second motion to reopen should have been filed with the BIA rather than the IJ because, at the time of the filing, the BIA was the last body to have issued a decision. *Id.* at 23a. The BIA nonetheless considered and rejected the second motion to reopen on its merits. It concluded that Kucana had failed to make out a *prima facie* case that he was eligible for asylum or withholding of deportation "based on material changes that have occurred in Albania since his failure to appear before the Immigration Judge in October 1997." *Id.* at 25a-26a (citing 8 C.F.R. § 1003.2(c)(3)(ii)). In the absence of such a showing, the BIA concluded that Kucana's motion to reopen was properly denied. *Id.* at 26a.

Kucana then sought review in the U.S. Court of Appeals for the Seventh Circuit. The appeals court dismissed the petition for review for lack of jurisdiction. *Id.* at 1a-21a. Relying on its prior decision in *Ali v. Gonzales*, 502 F.3d 659 (7th Cir. 2007), the court held that 8 U.S.C. § 1252(a)(2)(B)(ii) bars appeals from denials of motions to reopen final orders of removal because the immigration laws make clear that grant or denial of a motion to reopen rests within the discretion of the Attorney General. *Id.* at 4a-10a. The court said

that it had jurisdiction to hear any "constitutional claims or questions of law" raised by Kucana but that he had not raised any such claims. *Id.* at 10a-12a. Four judges on the Seventh Circuit signed an opinion dissenting from denial of rehearing *en banc*. *Id.* at 20a-21a.

## SUMMARY OF ARGUMENT

*Amici* agree with the Seventh Circuit's conclusion that 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of the denial of Kucana's motion to reopen his immigration proceedings. *Amici* write separately to point out that there is a more fundamental reason why judicial review is barred: 8 U.S.C. § 1229a(c)(7)(A) provides that an alien may file only "one motion to reopen proceedings" under § 1229a. Kucana's latest motion is his second motion to reopen (his first was filed in October 1997). As such, the BIA was prohibited from reopening the proceedings by § 1229a(c)(7)'s numerical limitation. Accordingly, an appeal is jurisdictionally barred because, as the United States acknowledges in its brief, the courts lack jurisdiction to hear appeals from denial of relief that the BIA is not authorized to grant.

Section 1229a(c)(7) provides for one exception from its numerical limitation, but that exception is inapplicable here. The exception, set forth in § 1229a(c)(7)(C)(iv), waives the numerical limitation for certain "battered spouses, children, and parents." In contrast, the provision that directly addresses asylum claims, § 1229a(c)(7)(C)(ii), waives the *time limitation* for asylum claims but not the *numerical limitation*. Section 1229a(c)(7) makes plain that the BIA lacked any

authority to grant Kucana's motion.

Regulations adopted by the Department of Justice prior to the adoption of § 1229a(c)(7) in 1996 purport to authorize the BIA – notwithstanding the numerical limitation – to reopen immigration proceedings when an alien seeks to "reapply for asylum or withholding of deportation based on changed circumstances" in the country to which deportation has been ordered. *See* 8 C.F.R. § 1003.2(c)(3)(ii). That regulation is invalid because it is not a reasonable interpretation of Congress's limited authorization for the reopening of immigration proceedings.

Alternatively, the judgment below ought to be affirmed because the Seventh Circuit correctly interpreted § 1252(a)(2)(B)(ii)'s limitation on judicial review of discretionary decisions of the Attorney General (and his designated surrogate, the BIA). Kucana asks the Court to read § 1252(a)(2)(B)(ii) as though it stated that its application is limited to situations in which "a provision in this subchapter explicitly states that the Attorney General has discretion to grant or deny relief." *Amici* submit that when the statute is considered as a whole and in the context of its adoption, § 1252(a)(2)(B)(ii) can more plausibly be read to bar judicial review whenever "the immigration laws make clear that the decision to grant or deny relief rests in the discretion of the Attorney General." Because this Court has repeatedly recognized that immigration law does not set forth criteria that, if satisfied, require the reopening of immigration proceedings but rather in all instances grants the Attorney General discretion to deny a motion to reopen,

§ 1252(a)(2)(B)(ii) bars judicial review of denial of a motion to reopen.

## ARGUMENT

### I. KUCANA MAY NOT SEEK JUDICIAL REVIEW OF DENIAL OF HIS SECOND MOTION TO REOPEN BECAUSE HIS MOTION WAS CATEGORICALLY BARRED BY THE NUMERICAL LIMITATION ON MOTIONS TO REOPEN

#### A. Under § 1229a(c)(7)(A), Aliens May Not File More Than One Motion to Reopen to Reopen Immigration Proceedings

Kucana's current motion to reopen his immigration proceedings is not the first such motion he has filed following the issuance of a final order of deportation/removal in 1997. He also filed a motion to reopen in October 1997, arguing that his failure to appear at his hearing before the IJ was excusable. Section 1229a(c)(7)(A) provides that aliens are limited to filing "one motion to reopen proceedings" under § 1229a. Because the current motion exceeds the numerical limitation imposed by § 1229a(c)(7)(A), the motion was improper and the BIA lacked statutory authority to grant it.

Section 1229a(c)(7) creates a single exception from its numerical limitation, but that exception is inapplicable here. The exception waives the numerical limitation for certain "battered spouses, children, and

parents." *See* 8 U.S.C. § 1229a(c)(7)(C)(iv) (setting forth a "special rule for battered spouses, children, and parents" and providing that "[a]ny limitation" set forth in § 1229a "shall not apply" to the filing of motions to reopen by such individuals); § 1229a(c)(7)(A) (providing that the numerical limitation on motions to reopen "does not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)"). Kucana's second motion to reopen is not one to which § 1229a(c)(7)(C)(iv) applies.

In contrast, the provision that directly addresses motions to reopen based on claims for asylum and withholding of removal waives the *time limitation* but not the *numerical limitation*. It states, "There is no time limit on the filing of a motion to reopen if the basis for the motion is to apply for" asylum or withholding of removal, § 1229a(c)(7)(C)(ii), but the statute makes no mention of waiver of the numerical limitation. The inclusion of an express waiver of the numerical limitation in (C)(iv) but the omission of such a waiver in (C)(ii) makes plain that Congress intended to bar second motions to reopen when based on a claim for asylum or withholding of removal.

The analysis is unchanged by the fact that Kucana's first motion sought to reopen for the purpose of rescinding an *in absentia* removal order. Motions to reopen for that purpose are subject to special restrictions set forth in 8 U.S.C. § 1229a(b)(5)(C).[2] But

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[2] In general, motions to reopen under § 1229a(b)(5)(C) will be granted only upon a showing that the alien's failure to appear at his hearing "was because of exceptional circumstances," or because

nothing in § 1229a suggests that a motion to reopen for the purpose of rescinding an *in absentia* removal order should not count as a first motion to reopen for purposes of § 1229a(c)(7)(A). To the contrary, § 1229a(c)(7)(A) explicitly limits aliens to one motion to reopen "under this section," and a motion to reopen for the purpose of rescinding an *in absentia* removal order is undeniably a motion "under this section" (*i.e.*, § 1229a).[3]

Indeed, in a recent decision regarding the filing of motions to reopen immigration proceedings, this Court explicitly recognized that Congress, through its enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, imposed "significant" limits on the filing of motions to reopen, including limits on the number of motions an alien may file. *Dada v. Mukasey*, 128 S. Ct. 2307, 2315-16 (2006).

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he never received notice of the hearing.

[3] Section 1229a(c)(7)(C)(iii) provides further evidence that Congress intended motions to reopen for the purpose of rescinding an *in absentia* removal order to be treated like all other motions to reopen when counting the total number of motions to reopen previously filed. (C)(iii) provides that the filing of a motion to reopen an *in absentia* removal order entered pursuant to § 1229a(b)(5) for failure to appear at an IJ hearing is subject to the 180-day filing deadline imposed by (b)(5)(C)(i) rather than the 90-day filing deadline imposed by (c)(7)(C)(i). The fact that Congress would see the need to spell out that the filing deadline set forth in § 1229a(c)(7)(C)(i) did not apply to motions to reopen for the purpose of rescinding an *in absentia* removal order strongly suggests that Congress believed that such motions were a normal part of the broader category of motions to reopen immigration proceedings.

The Court noted that regulations adopted by the Department of Justice and a provision of IIRIRA (codified at 8 U.S.C. § 1229a(c)(7)(A)) both limited an alien facing removal to only "one motion to reopen." *Id.*

In sum, the numerical limitation imposed by § 1229a(c)(7)(A) means that under no circumstances would Kucana have been entitled to a reopening of his immigration proceedings, even if he could have demonstrated a *prima facie* case of changed country conditions in Albania.

### B. Department of Justice Regulations Purporting to Waive the Numerical Limitation in Asylum Cases Are Invalid

Despite the clear language of § 1229a(c)(7)(A), the United States asserts, on the basis of Department of Justice regulations, that the numerical limitation on motions to reopen does not apply to this case. That regulation, 8 C.F.R. § 1003.2(c)(3)(ii), states that the numerical limitation on motions to reopen "shall not apply" to a motion to reopen proceedings to "reapply for asylum or withholding of deportation based on changed circumstances arising in the country of origin or in the country to which deportation has been ordered." Because (as demonstrated above) 8 U.S.C. § 1229a(c)(7)(A) expressly provides that the numerical limitation *does* apply to such motions, the regulation is invalid because it is not a reasonable interpretation of Congress's limited authorization for the reopening of immigration proceedings.

The history surrounding adoption of the statute and regulation dispels any doubt that the two are in direct conflict. Prior to adoption of IIRIRA in 1996, no federal statute so much as mentioned motions to reopen immigration proceedings following the entry of a final order of deportation. Nonetheless, since 1958 the Department of Justice has had in place regulations that provided for reopening of immigration under some circumstances. *Dada,* 128 S. Ct. at 2315. Until 1996, those regulations contained neither time nor numerical limitations on the filing of motions to reopen. *Id.*

In 1990, Congress adopted legislation expressing its concern that deportation proceedings were being unnecessarily prolonged by aliens who were abusing their right to file motions to reopen. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), directed the Justice Department to address its concerns:

> [T]he Attorney General shall issue regulations with respect to . . . the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations shall include a limitation on the number of motions that may be filed and a maximum time period for the filing of such motions.

Immigration Act of 1990 at § 545(d), 104 Stat. at 5066. In explaining the intent of § 545(d), the Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess., stated:

> Unless the Attorney General finds reasonable

> evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider.

H.R. Conf. Rep. No. 955 at 133.[4]

The Department of Justice responded by adopting regulations that for the first time imposed limitations on the number and timing of motions to reopen. Those regulations, which became final in April 1996, have undergone very few changes in the ensuing 13 years; the current version of the regulation imposing limitations on the number and timing of motions to reopen, 8 C.F.R. § 1003.2(c)(2) & (c)(3), is substantially similar to the version adopted in 1996. *See* 61 Fed. Reg. 18900 (Apr. 29, 1996). In particular, the 1996 regulations and the current regulations are identical in providing that: (1) a party may file only one motion to reopen; (2) that motion must be filed within 90 days of the final administrative action in the proceeding sought to be reopened; and (3) the time and numerical limitations do not apply to motions to reopen proceedings for the purpose of reapplying for asylum or withholding of deportation. *See* 8 C.F.R. § 3.2(c)(2) & (c)(3) (1996).

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[4] This Court has explicitly recognized that "a principal purpose" of the Immigration Act of 1990 was "to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions." *Stone v. INS*, 514 U.S. 386, 400 (1995). The Court noted that the Act "directed the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file." *Id.*

Congress responded five months later by adopting IIRIRA. That legislation for the first time codified the practice of granting motions to reopen immigration proceedings following issuance of a final order of removal. 8 U.S.C. § 1229a(c)(7). IIRIRA accepted the general rule adopted by the DOJ regulations with respect to time and numerical limitations: one motion to reopen, which must be filed within 90 days. 8 U.S.C. § 1229a(c)(7)(A) & (C)(i). However, Congress rejected the regulations' waiver rule with respect to motions to reopen for the purpose of seeking to reapply for asylum or withholding of removal. While the regulations had provided in April 1996 for both types of waiver with respect to such motions, IIRIRA provided for waiver only of the time limitation. 8 U.S.C. § 1229a(c)(7)(C)(ii).

In light of the timing (final regulations adopted in April 1996, followed by IIRIRA's enactment in September 1996), the legislation can only be viewed as an explicit rejection of the Department of Justice rule permitting waiver of the one-motion-to-reopen rule with respect to claims for asylum and withholding of removal. Congress intended thereby to prohibit the filing and granting of such motions to reopen when it is not the first motion to reopen filed by the alien. Yet despite that rejection, the Department of Justice has neither changed its regulations to conform to the statute, nor sought to explain how the two can be harmonized. Accordingly, the BIA lacks the authority to grant Kucana's motion to reopen; the regulation that the United States relies on to support its claim that the BIA possesses discretionary to grant the motion is invalid because it conflicts with 8 U.S.C. § 1229a(c)(7)(A).

### C. Kucana May Not Seek Judicial Review of the Denial of His Motion When the BIA Lacks Discretionary Authority to Grant the Motion

Congress has decreed that aliens who are subject to a final order of removal and who have filed a previous motion to reopen, may not file a second motion to reopen for the purpose of applying or reapplying for a discretionary grant of asylum or withholding of deportation. 8 U.S.C. § 1229a(c)(7)(A). Kucana filed just such a second motion, and (not surprisingly, given the plain language of the statute) it was denied by the BIA. He appeals from that denial, but he raises no constitutional challenge to the numerical limitation. Under those circumstances, he is not entitled to judicial review of a claim that amounts to nothing more than a plea for the BIA to exercise its own authority to reopen.

As explained above, a principal motivating factor in Congress's decision to impose the numerical limitation was a desire to streamline administrative and judicial review procedures. *See, e.g., AADC*, 525 U.S. at 486 ("[*M*]*any* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation"). But these measures can accomplish few of Congress's streamlining purposes if aliens remain free to seek judicial review of denials of administrative relief for which Congress has decreed them categorically ineligible. Permitting judicial review under those circumstances is as an end run around the limitations imposed by Congress; it serves only to delay proceedings, and "as a general matter, every delay

works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 323 (1992).

Although § 1229a(c)(7)(A) provides that the BIA may not grant Kucana's motion to reopen his immigration proceedings because it is barred by the numerical limitation, the BIA nonetheless could choose to reopen the proceedings on its own authority. Indeed, Department of Justice regulations provide that the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." 8 C.F.R. § 1003.2(a). But as the United States notes, the federal appeals courts unanimously agree that an alien is not entitled to judicial review of the BIA's denial of the alien's request that the BIA reopen proceedings on its own authority:

> The unanimous view of the courts of appeals is that such a claim is unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. 701(a)(2), and there are no judicially manageable standards for reviewing such a decision, see, *e.g.*, *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals).

U.S. Br. 24 n.15.

Kucana does not assert that the BIA violated his constitutional rights or made an error of law. He asserts only that the BIA abused its discretion in denying his motion to reopen. But § 1229a(c)(7) makes

clear that the BIA does not possess any discretion to grant his motion. Under those circumstances, Kucana should not be permitted to obtain judicial review. Alternatively, the Court should rule that the BIA did not abuse its discretion by denying relief (reopening the immigration proceedings) that it was not authorized to grant.

## II. SECTION 1252(A)(2)(b)(ii) BARS JUDICIAL REVIEW OF DENIAL OF A MOTION TO REOPEN IMMIGRATION PROCEEDINGS

8 U.S.C. § 1252(A)(2)(b)(ii) provides that "no court shall have jurisdiction to review" a decision of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." It is undisputed that no provision of the immigration laws states *explicitly* that the grant or denial of a motion to reopen immigration proceedings is committed to the discretion of the Attorney General. *Amici* nonetheless submit that § 1252(A)(2)(b)(ii) – when read in the context of the entire body of federal immigration statutes and of the circumstances surrounding its adoption – is fairly read to bar judicial review of denial of motions to reopen immigration proceedings.

1. Kucana proceeds on the assumption that the word "specified" is synonymous with the words "explicitly stated." To the contrary, while the word "specify" connotes some degree of clarity in congressional intent, it cannot fairly be understood as requiring that the discretionary nature of a decision be

stated explicitly in a statute. Synonyms for "specify" include "detail, indicate, enumerate, stipulate." *See*, e.g., Dictionary.com, "specify," in Dictionary.com Unabridged, Random House, Inc., http://dictionary.reference.com/browse/specify. The discretionary nature of grants or denials of motions to reopen should be deemed to be "specified" under the immigration code because that discretionary nature is clearly indicated by the code even though it is not explicitly stated in any one provision of the code.

2. We note initially that Kucana does not seriously contest that a decision to grant or deny a motion to reopen is a discretionary decision of the Attorney General. As the Court recently noted, "the reopening of a case by the immigration authorities for the introduction of new evidence" is, and was historically, treated "as 'a matter for the exercise of their discretion.'" *Dada,* 128 S. Ct at 2315 (quoting *Wong Shong Been v. Proctor*, 79 F.2d 881, 883 (9th Cir. 1935)). Long before there was any statutory authorization for reopening immigration proceedings, the Justice Department beginning in 1958 issued regulations authorizing the filing of motions to reopen but making clear at all times that the decision to grant or deny such motions was a matter committed to the Attorney General's discretion. *Id.* The current DOJ regulation governing motions to reopen, which has been in place for many years, provides:

> The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to

> reopen even if the party moving has made out a *prima facie* case for relief.

8 C.F.R. § 1003.2(a).

3. As the United States notes in its brief, federal courts for many years have entertained appeals from denial of motions to reopen, and have reviewed those decisions under an abuse of discretion standard. U.S. Br. 22-23. But it was Congress's belief that aliens were taking advantage of overly lax appeal procedures to unnecessarily delay the completion of immigration proceedings, and for that reason it adopted – as part of IIRIRA – both § 1252(a)(2)(B)(ii) as well as other provisions limiting judicial review of immigration proceedings. *See, e.g.*, §§ 1252(a)(2)(A), 1252(a)(2)(C), 1252(b)(4), 1252(b)(9), 1252(g). Indeed, the Court has recognized that "*many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation." *AADC*, 525 U.S. at 486 (emphasis in original). Section 1252(b)(9), for example, provides that review of "all questions of law and fact" arising in connection with "any action taken or proceeding brought to remove an alien from the United States under this subchapter" is available *only* in connection with the judicial review of a "final order" of removal provided for under § 1252(b). This so-called "zipper clause" has the effect of significantly limiting the occasions on which an alien facing removal may seek judicial assistance to avoid removal.

4. In light of Congress's awareness in 1996 that motions to reopen, while not statutorily authorized,

were routinely accepted and made subject to the BIA's discretion, it seems overwhelmingly clear that such motions were among the ones contemplated by Congress as falling within the restrictions imposed by § 1252(a)(2)(B(ii). For one thing, although *amici* have been unable to obtain from the U.S. any statistics that break down the number of times in which aliens have sought judicial review of denials of motions to reopen, anecdotal evidence suggests that a significant percentage of all lawsuits alleging that the BIA abused its discretion were appeals from denials of motions to reopen. It is inconceivable that a Congress concerned with perceived excesses by aliens in seeking judicial review of discretionary decisions would choose to make the IIRIRA provision that was intended to address such excesses – § 1252(a)(2)(B(ii) – inapplicable to appeals from denial of motions to reopen, the likely #1 source of abuse.

5. The United States points to numerous examples of instances in which the immigration statutes explicitly name immigration-related decisions that are delegated to the discretion of the Attorney General; the United States suggests that Congress would similarly have mentioned motions to reopen by name if it had intended those motions to be covered by § 1252(a)(2)(B(ii). But there is no reason to ascribe such a motivation to Congress given that, until 1996, motions to reopen were not even mentioned in the immigration laws. The more pertinent fact is that it was universally understood in 1996 that the grant or denial of motions to reopen was, indeed, entrusted to the discretion of the Attorney General. Given that understanding, and the entire tenor of IIRIRA, it is inconceivable that Congress

would not have understood that denials of motions to reopen were covered by § 1252(a)(2)(B)(ii).

6. The United States argues that its position is supported by § 1252(b)(6), which was also adopted as part of IIRIRA. That clause provides, "When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of that order." The United States argues that § 1252(b)(6) indicates that Congress contemplated that courts would continue to have jurisdiction to hear motions to reopen.

The United States reads far too much into this provision. IIRIRA is chock full of provisions that overlap one another. *Compare, e.g.*, §§ 1252(b)(9) and 1252(g). Congress's evident intent was to express in as many different ways as possible that it was seeking to cut down on what it viewed as excessive judicial review of immigration proceedings. One method for doing so was to prevent judicial review of discretionary decisions, such as decisions denying motions to reopen – § 1252(a)(2)(B)(ii). Another method was to make sure that if a court, notwithstanding § 1252(a)(2)(B)(ii), insisted that it had the authority to review the denial of a motion to reopen, the number of judicial proceedings would be minimized by insisting on the consolidation of the appeal from the denial with any appeal from a final order of removal – § 1252(b)(6).

Congress proved prescient in its insertion of somewhat redundant review-restricting provisions in IIRIRA. On several occasions, this Court has adopted extremely expansive interpretations of IIRIRA

provisions regarding judicial review, in order to avoid potential constitutional problems that might arise if the provisions were given narrower readings. *See, e.g., INS v. St. Cyr,* 533 U.S. 289 (2001); *Clark v. Martinez,* 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001). The existence of overlapping review-restricting provisions has allowed Congress to keep a lid on abusive appeals by aliens seeking to delay their removal, even as this Court and other federal courts have cut back on portions of IIRIRA's jurisdiction-stripping provisions.

7. As noted above, a principal concern that motivated adoption of IIRIRA was an intent to streamline the immigration appeals process and thereby cut down on the number of immigration-related appeals. It is an understatement to suggest that that goal has not been fully achieved. To the contrary, the number of immigration-related cases in the federal appeals courts has skyrocketed over the past decade since the adoption of IIRIRA. *See*, e.g., Margaret Lee, *Immigration Litigation Reform,* Congressional Research Service (May 6, 2006); Michael B. Mushlin, *The Surge in Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, Pace University Law School, Vol. 60 No. 1 (2005), available at http://digitalcommons.pace.edu/lawfaculty/536 (immigration appeals rose 294% in the federal appeals courts from 2001 to 2002, and increased from 175 in the Second Circuit in 2001 to 2,224 in 2003).

While there are undoubtedly numerous causes for the surge in immigration appeals, anecdotal evidence suggests that one significant factor has been the continued availability of appeals from denial of motions

to reopen, despite the existence of § 1252(a)(2)(B)(ii). Among the circuit courts, only the Seventh Circuit has interpreted that provision as barring judicial review of denials of motions to reopen. The ability of the two appeals courts with the largest immigration-related dockets – the Second and Ninth Circuits – to function on a timely basis has been significantly impaired by the crush of immigration cases. Mushlin, *supra*, at 246-47. *Amici* respectfully suggest that ascribing to § 1252(a)(2)(B)(ii) an intent to bar appeals from denials of motions to reopen – a meaning that best comports with its language and the background surrounding adoption of IIRIRA – would be a significant step toward achieving the reduction of the immigration case law intended by Congress.

## CONCLUSION

*Amici curiae* request that the Court affirm the decision of the court of appeals.

Respectfully submitted,

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